88-5746

(3)

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BERNARD LEE HAMILTON, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

Appendix

BARRY L. MORRIS
Attorney at Law
580 Grand Avenue
Oakland, California 94610
(415) 839-1288

Attorney for Petitioner
BERNARD LEE HAMILTON

Opinion of the California Supreme Court

[Crim. No. 21959. May 19, 1988.]

THE PEOPLE, Plaintiff and Respondent, v.
BERNARD LEE HAMILTON, Defendant and Appellant.

[Crim. Nos. 25303, S001870. May 19, 1988.]

In re BERNARD LEE HAMILTON on Habeas Corpus.

SUMMARY

Defendant was convicted of first degree murder (Pen. Code, § 187), kidnapping (Pen. Code, § 207), robbery (Pen. Code, § 211), and burglary (Pen. Code, § 459). He was found to have committed the murder in the course of robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), kidnapping (§ 190.2, subd. (a)(17)(ii)), and burglary (§ 192, subd. (a)(17)(vii)). He was sentenced to death. (Superior Court of San Diego County, No. 47283, Franklin B. Orfield, Judge.)

On remand from the United States Supreme Court, following its vacation of the previous judgment which had reversed the death penalty for failure of the trial court to instruct that intent to kill was an element of the felony-murder special circumstances, the Supreme Court affirmed the judgment in its entirety, and denied two petitions for habeas corpus. The court held the cause in its entirety was properly before it, and adopted its prior decision dealing with guilt issues as its decision in the proceeding. It further held the trial court did not err in failing to instruct the jury that intent to kill was an element of the felony-murder special circumstance, and thus did not reach the issue, the subject of the United States Supreme Court's remand order, of whether a failure to instruct on intent was subject to harmless-error analysis. The court held that the trial court did not abuse its discretion in denying defendant's motion to represent himself which was made in the midst of the jury's guilt phase deliberations. It also held that under the circumstances of the case and in view of the whole record defendant was not prejudiced by potentially misleading instructions pertaining to the jury's sentencing responsibility and discretion. The court held that although the trial court erred in giving a so-called Briggs instruction relating to the Governor's commutation and pardon power, the error was not prejudicial in view of the

trial court's subsequent instructions and admonitions not to make any use of the instruction in determining the penalty to be imposed on defendant. On the habeas corpus petitions, the court held defendant failed to show he was denied effective representation of counsel, and also rejected his claim the prosecution interfered with his attempt to obtain evidence. (Opinion by Mosk, J., with Lucas, C. J., Panelli, Arguelles, Eagleson, and Kaufman, JJ., concurring. Separate concurring and dissenting opinion by Broussard, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Courts § 33—Decisions and Orders—Law of the Case—Supreme Court Vacation of Judgment Remand.**—Where, in a death penalty case, the United States Supreme Court granted the California Attorney General's petition for certiorari on a particular issue, vacated the judgment, and remanded to the California Supreme Court for further proceedings, the decision was rendered a nullity and as such had no binding force. The cause in its entirety was then before the California Supreme Court. Accordingly, the doctrine of law of the case did not bar reconsideration of any point decided in the first case. The doctrine may be applied only when and to the extent the prior decision had binding force.

(2) **Homicide § 70—Instructions—Nature and Elements of Offense—Intent to Kill—Special Circumstances—Felony Murder.**—In a capital murder prosecution, the trial court did not err in failing to instruct the jury that intent to kill was an element of the felony-murder special circumstance, where all the evidence showed that defendant either actually killed the victim or was not involved in the crime at all, and there was no evidence that he was an aider and abettor. An instruction on intent to kill is only required when there is evidence from which the jury could find that the defendant was an aider and abettor rather than the actual killer.

(3a, 3b) **Criminal Law § 87.2—Rights of Accused—Aid of Counsel—Self-representation—Timeliness of Motion—Capital Case.**—In a death penalty case, defendant's motion to represent himself, filed in the midst of the jury's guilt phase deliberations, was not timely for purposes of invoking the absolute right of self-representation. The penalty phase could not be considered a separate trial for purposes of the motion. The penalty phase has no separate formal existence but is

merely a stage in a unitary capital trial. Moreover, the connection between the phases of a capital trial is substantial and not merely formal.

(4) **Criminal Law § 87.2—Rights of Accused—Aid of Counsel—Self-representation—Denial of Motion—Discretion.**—The trial court in a capital case did not abuse its discretion in denying defendant's untimely motion to represent himself, where, although the court considered irrelevant factors such as defendant's inability "to roam around the courtroom" in shackles and his lack of competence in law, it nevertheless made a reasonable determination, after considering the proper factors, that defendant should not be permitted to represent himself at the penalty phase of the trial.

(5) **Homicide § 101—Punishment—Death Penalty—Sentencing Formula.**—The sentencing formula of Pen. Code, § 190.3, is not unconstitutional on the asserted ground that it withdraws from the trier of fact constitutionally compelled discretion and thereby undermines the reliability of the verdict.

(6) **Criminal Law § 523—Punishment—Penalty Trial—Instructions—Mandatory Sentencing Language.**—In the penalty phase of a capital case, an instruction incorporating the mandatory sentencing language of Pen. Code, § 190.3, did not mislead the jurors to defendant's prejudice as to the scope of their sentencing responsibility and discretion in violation of constitutional principles. Although in closing argument the prosecutor referred briefly to the mandatory sentencing language, he clearly acknowledged the jurors' discretion and their individual responsibility. In his closing argument defense counsel emphasized it was the sole responsibility of the jurors to determine whether the death penalty was appropriate for defendant. Also, at defendant's request the court instructed the jurors on their proper function in weighing aggravating and mitigating factors.

[See Cal.Jur.3d (Rev), Criminal Law, § 3345; Am.Jur.2d, Homicide, § 555.]

(7) **Criminal Law § 523—Punishment—Penalty Trial—Instructions—Mitigating Factors.**—In the penalty phase of a capital case, a potentially misleading instruction on what the jury could consider in mitigation did not mislead the jury to defendant's prejudice. The jurors were in fact adequately informed that they could consider character and background evidence. After the defense presented a case that consisted entirely of such evidence, the court instructed the jurors that they

should not limit their consideration of mitigating circumstances to the specific statutory factors, but should consider any other circumstances presented as reasons for not imposing the death sentence.

(8) **Criminal Law § 523—Punishment—Penalty Trial—Instructions—Re Governor's Power to Commute or Modify.**—In the penalty phase of a capital case, the trial court erred in instructing the jury as to the Governor's commutation and pardon powers as to life sentences (Briggs instruction), and the error was not cured by a supplementary instruction that did not alter the objectionable language which continued to mislead and to invite speculation on irrelevant and improper matters. However, the error was not prejudicial, in view of the court's direction to the jurors not to make any use of the erroneous instruction in determining the penalty to be imposed on defendant. Jurors are presumed to follow the instructions given by the court. A brief and isolated comment by the prosecutor that defendant would spend his time in prison devising ways to manipulate the system and get out could not be understood to refer to the erroneous instruction. The remark did not even allude to the commutation power.

(9) **Criminal Law § 521—Punishment—Penalty Trial—Evidence—Invalid Special Circumstance.**—Even if one of three felony-murder special circumstances was invalid and improperly presented to the jury as evidence in aggravation in a capital case, no reversible error occurred, in view of the overwhelming evidence in aggravation and the minimal evidence in mitigation.

(10) **Homicide § 97—Verdict, Sentence, and Punishment—Capital Case—Power to Strike Special Circumstance Findings.**—Pen. Code, § 1385, authorizes the trial court to dismiss "in furtherance of justice" in any circumstance in which the legislative body has not clearly manifested a contrary intent. Thus, under the 1978 death penalty law, the trial court in a capital case had the authority to strike the special circumstance findings pursuant to § 1385.

(11) **Homicide § 101—Punishment—Death Penalty—Validity.**—Where, in view of the theories presented and the evidence introduced, the jury's guilt phase verdicts in a capital trial implied a finding that defendant was the actual killer, and where that finding was amply supported by the evidence, the imposition of the penalty of death on defendant did not violate U.S. Const., 8th Amend.

(12) **Criminal Law § 104—Rights of Accused—Competence of Defense Counsel—Burden of Proof.**—In order to establish a claim of

ineffec
perfor
under
fense
favora

(13) Crim
Couns
convi
errors
treate
that f
ing ju
either

(14) Crim
Whet
be ad
the w
not a

(15) Crim
Trial
crimi
sched
invol
prose
subst
the c
uling

(16) Cri
Supp
pus t
by h
the c
to a
mole
attri

COUNSEL

Barry L.
Appellan

ineffective assistance of counsel, a defendant must show that counsel performed at a level below an objective standard of reasonableness under prevailing professional norms; and thereby subjected the defense to prejudice, that is, in the absence of counsel's failings a more favorable outcome was reasonably probable.

(13) **Criminal Law § 104—Rights of Accused—Competence of Defense Counsel—Burden of Proof—Allegations.**—On appeal from a capital conviction, allegations by defendant that trial counsel made various errors in strategy and tactics and that they feared defendant and treated him with distrust, and that appellate counsel refused to argue that facial expressions and gestures trial counsel assertedly made during jury selection prejudiced the defense, failed to effectively allege either deficient performance or prejudice.

(14) **Criminal Law § 233—Trial—Power and Conduct of Judge—Bias.**—When the state of mind of the trial judge in a criminal trial appears to be adverse to one of the parties but is based on actual observance of the witnesses and evidence given during the trial of the action, it does not amount to prejudice.

(15) **Criminal Law § 48—Rights of Accused—Fair Trial—Presence at Trial—Scheduling Hearing.**—A defendant charged with capital crimes was not entitled to be present at a pretrial hearing to establish a schedule under which a defense criminologist would examine a vehicle involved in the murder. An accused is not entitled to be personally present on matters in which his presence does not bear a reasonably substantial relation to the fullness of his opportunity to defend against the charge. Defendant's attendance at what was essentially a scheduling hearing would not have been useful or of benefit to the defense.

(16) **Criminal Law § 45—Rights of Accused—Fair Trial—Distortion or Suppression of Evidence.**—A capital defendant's claim on habeas corpus that the prosecution interfered with his attempt to obtain evidence by having a van involved in the murder examined and cleaned before the defense criminologist could subject it to inspection and tests failed to adequately allege interference, where it did not state that the criminologist acted without undue delay or that the delay on his part was attributable to the prosecution.

COUNSEL

Barry L. Morris, under appointment by the Supreme Court, for Defendant, Appellant and Petitioner.

5

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Harley D. Mayfield, Assistant Attorney General, Jay M. Bloom, John W. Carney, Michael D. Wellington and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MOSK, J.—The cause in Crim. 21958 is before us on remand from the United States Supreme Court. It was last here on automatic appeal from a judgment of death. (Pen. Code, § 1239, subd. (b).) Defendant was convicted of first degree murder (*id.*, § 187), kidnapping (*id.*, § 207), robbery (*id.*, § 211), and burglary (*id.*, § 459). He was found to have committed the murder in the course of robbery (*id.*, § 190.2, subd. (a)(17)(i)), kidnapping (*id.*, subd. (a)(17)(ii)), and burglary (*id.*, subd. (a)(17)(vii)). He admitted that he had previously suffered convictions for forgery (*id.*, § 470) and for two counts of burglary (*id.*, § 459). He was sentenced to death.

When the cause was previously before us we held there was no reversible error at the guilt phase of the trial, but that under the general rule of automatic reversal of *People* v. *Garcia* (1984) 36 Cal.3d 539 [205 Cal.Rptr. 265, 684 P.2d 826], the court's failure to instruct in accordance with *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], that intent to kill was an element of the felony-murder special circumstances, required the setting aside of the special circumstance findings and hence the reversal of the judgment of death. (*People* v. *Hamilton* (1985) 41 Cal.3d 408 [221 Cal.Rptr. 902, 710 P.2d 981] [*Hamilton I*].)

After seeking rehearing in this court without success, the Attorney General petitioned the United States Supreme Court for a writ of certiorari. The court granted the petition, ordered our judgment vacated, and remanded the cause for reconsideration in light of its decision in *Ruse* v. *Clark* (1986) 478 U.S. 570 [92 L.Ed.2d 460, 106 S.Ct. 3101].

Subsequently, defendant in propria persona filed two petitions for writ of habeas corpus. (Crim. 25303 and S001870.) We consolidate the cause in Crim. 21958 and the proceedings in Crim. 25303 and S001870 for purposes of decision.

As we shall explain, we conclude, as we concluded in *Hamilton I*, that the judgment must be affirmed as to guilt. Contrary to our determination in *Hamilton I*, we now conclude that the special circumstance findings must be upheld: under *People* v. *Anderson* (1987) 43 Cal.3d 1104, 1147 [240

Cal.Rptr. 585, 742 P.2d 1306], the court was not obligated to instruct on intent to kill with regard to the special circumstances here; and defendant does not present any other ground for setting aside the findings. We also conclude that the judgment must be affirmed as to penalty. Finally, we conclude that the petitions for writ of habeas corpus must be denied.

I. DIRECT APPEAL (CRIM. 21958)

A. *The Facts*

The facts of this case, which appear in *Hamilton I* at pages 413 to 419 of 41 Cal.3d, are relevant to our decision and are accordingly quoted in extenso below:

"The evidence presented in the prosecution's case-in-chief tells the following tale: 'On May 31, 1979, about 1 p.m., the body of Eleanore Frances Buchanan was discovered in the grass near a cul-de-sac off Pine Valley Road, near San Diego. Harry Piper noticed it while walking back to his car from target shooting. The body had no head or hands and was clothed only in a bra, underpants and socks.

"'The body appeared to be in full rigor mortis when a deputy sheriff arrived at the scene between 1:30 and 2 p.m. Two strings of white cord were tied around the ankles, and there were dark blue fibers sticking to some blood on the body. There were marks on the wrists indicating that they had been tied together. A search of the area revealed no clothing or anything else that could be associated with the victim.

"'Dr. Luibel, who performed the autopsy, was unable to determine the cause of death because of the absence of the head. (The head and hands have never been found.) He could, however, rule out natural causes. There were three long superficial incisions on the abdomen that appeared to have been inflicted after death. There was a horizontal stab wound on the abdomen that had probably been inflicted before death, but it did not penetrate the stomach or intestines. The right hand appeared to have been sawed off and the left one cut off with a knife. The head was probably removed by using both a knife and saw. Dr. Luibel could not say whether the victim was alive or dead when her head was cut off. The small amount of hemorrhage at the wrists suggested the victim was probably dead when her hands were cut off. The body was still in full rigor mortis at 4 p.m. on May 31, 1979, when Dr. Luibel examined it. Death would have occurred about 16 hours before then—about midnight the night before.

"'Terry Buchanan, the victim's husband, testified that his wife had given birth to a baby boy three weeks before her death and that she was still

nursing him on May 30, 1979. That day Mrs. Buchanan left the house about 6:30 p.m. to go to a math class at Mesa College from 7 to 10 p.m. She was wearing tan levis, a beige and brown T-shirt, and was carrying a brown simulated leather purse. Mrs. Buchanan drove the family's only vehicle—a new blue van. There was very little gas in the tank because Buchanan planned to have the tank replaced the next day. Since Buchanan used the van during the day for his dental supply sales work, the van contained dental equipment and supplies. Buchanan said his wife was very security conscious and customarily locked the van. He also said that everything in the van was in good condition when she left.

"Mrs. Buchanan was last seen alive walking toward the parking lot from her math class about 9:30 p.m. Fellow students had given her copies of class notes for the classes she had missed because of the birth of her baby. Mrs. Buchanan had left class a little early because an optional quiz was given at 9:30 p.m.

"At 1:52 a.m. (California time) on May 31, 1979, defendant called his girlfriend, Donna Hatch, in Terrell, Texas from his parents' home in San Diego. He told Donna that he had a van and was planning to leave for Texas as soon as the gas stations opened in the morning.

"There was a gasoline shortage at the time, and gas stations were only open for limited hours. Between 4:45 a.m. and 10:15 a.m. on May 31, 1979, defendant used Terry and Eleanore Buchanan's Visa card to buy gas in El Cajon, California. The card was used two more times that day to buy gas for the van—once in El Centro, California at a station that was open between 6 a.m. and 10 a.m., and once in Tucson, Arizona.

"When defendant arrived at Donna Hatch's home in Terrell, Texas on the evening of June 1, 1979, the van was dirty, had a broken arm on the driver's chair, a broken mirror, and a broken wing window on the passenger side. Defendant took Donna with him on errands in the van on June 1, 2 and 3, 1979. Donna saw some credit cards in the name of Terry and Eleanore Buchanan in the compartment between the seats. Defendant used the credit cards to buy gas and food while Donna was with him.

"On June 3, while Donna was in the van with defendant and her daughter, they saw a highway patrolman. When Donna turned back to talk to her daughter, defendant told her not to make any sudden moves because they could get shot. Later, defendant stopped at a pay phone to call his brother and his friend Clifford. Donna heard defendant tell his brother he had flown to Texas. Clifford testified that when defendant called him, he was watching a report on TV that the body of a white woman with her head and hands

cut off
nervous
thought
because
Defend
attentio
Donna

"Don
Donna
dead, h
discuss
At one
'I'm go
be arou
vehicle

"Def
and ot
screwd
butchc

"W
stoppe
numbc
arreste
a rewa

"On
Oklah
come
stating
that it
advise
ties he
who h
cer. F
given
to stay
with I

[1]At
school
in her

cut off had been found; he told defendant about it. Defendant seemed nervous when he returned from talking to Clifford. He told Donna that he thought he had killed a man, but he did not want to tell her any details because she might not want to have anything to do with him if he told her. Defendant said he would let the van sit a while to see if anybody paid attention to it. He also said he needed some Texas license plates. He asked Donna to go with him to a car lot, but she refused.

"Donna broke up with defendant the next day. Defendant said that if Donna were upset about the fact that he had lied about his ex-wife being dead, he would kill his ex-wife. On June 6, defendant called Donna to discuss bringing her back to California to testify for him in a pending case. At one point, a friend of Donna's got on the phone. Defendant told Donna, 'I'm going to kill you and your friend, too. And you won't know when I'll be around because I don't have to be driving this van, I can be in another vehicle.' Donna never saw or talked to defendant after that phone call.

"Defendant continued using the Buchanans' credit cards to buy gas, food and other items. It was stipulated that on June 6 defendant charged a saw, screwdriver and set of wrenches at a local store, and on June 7, he bought a butcher knife and two skeins of twine at a variety store.

"While driving the van in Oklahoma on June 8, 1979, defendant was stopped by a deputy sheriff. The deputy ran a check of the van's VIN number and learned that it belonged to the homicide victim. Defendant was arrested and taken to jail. On the way to the jail he passed a poster offering a reward for David L. Wall, alias 'Spider.'

"On June 9, 1979, San Diego sheriff's deputies interviewed defendant in Oklahoma. They began by introducing themselves, saying that they had come to talk to defendant about the van. Defendant interrupted them, stating: 'Yeah, the guy told me yesterday, one that pulled the gun on me, that it had been involved in a homicide, and uh . . . .' Defendant was then advised of his *Miranda* rights, which he waived. Defendant told the deputies he had left San Diego in the van with Spider and Fran, a white woman who had left her husband for Spider. Spider's real name was Calvin Spencer. Fran and Spider were presently in Shreveport, Louisiana. They had given defendant the van and credit cards when he had said he did not want to stay in Louisiana. Defendant was shown a picture of Eleanore Buchanan with her baby. He said it looked like Fran, but Fran was a little skinnier.[1]

[1]At this point the opinion notes: "Fran was Eleanore Buchanan's nickname. It was on the school papers she had been carrying and on an unmailed birth announcement that had been in her purse." (45 Cal.3d at p. 416, fn. 2.)

9

Defendant said 'the only time I seen her' Fran was wearing light colored jeans and carrying a beige nonleather purse.

"Enroute to San Diego, defendant was disturbed about his arrest for murder and kept saying it was not going to stick because all the police had was a body they could not identify and a runaway wife."[6]

"Shortly after defendant's preliminary hearing, Terry Buchanan received a letter with defendant's county jail return address. It said, 'You are probably full of grief when you should be highly pissed-off . . .' because Fran was not dead but had left with Spider and was smoking Sherman Sticks. Buchanan turned the letter over to the district attorney's office.

"Steven Thomas, an inmate at the San Diego County jail, testified that on January 24, 1980, he had a conversation with defendant about his case. He asked defendant, 'Who are you trying to convince, Hamilton, me or yourself?' Defendant replied, 'Well, I did it but they'll never prove it.' Thomas reported the conversation to the guard. Thomas had been convicted of murder, robbery, forgery, burglary and escape. Thomas testified he was in the federal witness protection program against organized crime, but had not received any money from the United States with respect to that program.

"While transporting defendant between the jail and courtroom on August 21, 1979, Deputy Sheriff Parsons was tightening defendant's security chains. Defendant said, 'All right, you have your fun, I'll have mine later.' Parsons responded, 'I thought you already had your fun.' Defendant replied, 'Yeah, and I'll kill a lot more, too, and you may be first on my list.'

"Brandon Armstrong, a criminalist, testified that the blue fibers that had been on the victim's body could easily have come from the carpet in the victim's van. Blood on the carpet in the van matched the type and characteristics of the victim. Several hairs found in the carpet stains could have been hers. Armstrong also examined blood found on defendant's shoe and concluded that it had been smeared on when wet. The blood on defendant's shoe was type O—the victim's type.[7] Defendant's type was A.

"A questioned documents expert testified that defendant was the person who had signed Terry Buchanan's name to the credit card invoices." (41 Cal.3d at pp. 413-417.)

[6] At this point the opinion notes: "The body was, in fact, quickly identified by a number of distinctive features, which included moles, toenail polish, scars, recent ejaculation, and the nursing bra." (41 Cal.3d at p. 416, fn. 3.)

[7] At this point the opinion notes: "Armstrong testified on rebuttal that the blood on defendant's shoe could not have come from rubbing against the blood on the van's carpet." (41 Cal.3d at p. 417, fn. 4.)

The defense case was as follows. "Defendant's mother testified that he was at her house between 8 and 9 p.m. on May 30, 1979. She said that although she testified at the preliminary hearing that she did not remember seeing defendant on the evening of May 30, 1979, she later spoke to defendant who refreshed her recollection by reminding her of some things that had happened that evening.[8]

"Mary Brewer, a relative of defendant's who lived in Oklahoma City, testified that defendant had visited her in the early part of June 1979. He gave her a ride in the van, and she did not remember seeing any blood in it.

"Defendant testified that he had never seen the victim alive or dead. He said he went to his sister-in-law's house after he left his parent's house about 9 p.m. on May 30, 1979. He saw the Buchanans' van parked on a street between 12:45 and 1 a.m. on May 31, 1979, while walking home from a 7-Eleven store after talking to Butch McIntyre.[9] The keys were in the ignition, the wing wind; w was broken, and a purse was on the passenger seat. Defendant drove the van home, called Donna Hatch, put his clothes in it and left for Texas shortly before sunrise. Defendant said he broke the armrest on the driver's seat when he was moving from the passenger seat to the driver's seat. (The seats were swivel chairs with armrests.)

"Defendant explained that he had told the officers in Oklahoma that he had driven across the country with Spider and Fran because he did not want to get stuck with an auto theft charge.

"Defendant denied having threatened to kill Donna Hatch. He said he bought the saw and other items on June 6 before he spoke to Donna Hatch. He planned to use them to burglarize a store in Terrell. Defendant said he was attempting to distract Donna when he told her he thought he had killed someone; she was angry at him because she had just found out he had lied about his ex-wife being dead.

"David Faulkner, an entomologist, testified about an experiment he had conducted in an attempt to determine when the victim's body had been left at the cul-de-sac. Faulkner took a rabbit, with its head and forepaws severed, and at midnight put it where the victim had been found. The purpose was to determine the amount of insect activity that would occur. Faulkner

[8] At this point the opinion notes: "Defendant had written two letters to Donna Hatch after her preliminary hearing testimony attempting to refresh her recollection as to events that involved her." (41 Cal.3d at p. 417, fn. 5.)

[9] At this point the opinion notes: "McIntyre testified he saw defendant after watching the NBA game on TV. There had, however, been no game on May 30. There had been one on May 29, 1979." (41 Cal.3d at p. 418, fn. 6.)

11

testified that within a few hours of sunrise there were a lot of flies around the rabbit. Based on this experiment and his knowledge of the temperature on the morning of May 31, 1979, Faulkner concluded that the earliest the body would have been put there would have been 9 a.m. Faulkner admitted, however, that there is a great deal of variation in the degree to which insects are attracted to different human bodies.

"Parker Bell, a criminalist, testified that the blood on defendant's shoe was a smear, as opposed to a droplet or splatter. He thought the blood could have come from the carpet, but he acknowledged that there were no blue fibers in the blood. (The blue carpet shed badly.) On cross-examination, however, Bell admitted it was possible that the blood could have been smeared on defendant's shoe by having bumped one of the victim's bloody stumps.

"Dr. Ali Hameli, Chief Medical Examiner of the State of Delaware, testified that in his opinion the victim died between 9:30 and 12 p.m. on May 30. Dr. Hameli also thought that rigor mortis was present when the body was placed at the cul-de-sac and that the body could have been put there no earlier than 4 a.m. on May 31.

"Allen Biggs testified that he had been at the cul-de-sac about 10 a.m. on May 31, 1979. He had seen Mr. Piper's car but no body. Deputy Sheriff Crawford testified that tire tracks at the scene in the cul-de-sac did not match the tire tracks of the victim's van.[*]" (41 Cal.3d at pp. 417-419.)

B. *Hamilton I*

In *Hamilton I*, we considered the issues going to guilt raised by defendant and concluded that none required reversal. (41 Cal.3d at pp. 419-431.) We also concluded that in violation of our decision in *Carlos* v. *Superior Court*, *supra*, 35 Cal.3d 131, the court failed to instruct the jury that intent to kill was an element of the felony-murder special circumstances. (41 Cal.3d at p. 431.) Further, we concluded that this error fell within the scope of the rule of automatic reversal laid down in *People* v. *Garcia*, *supra*, 36 Cal.3d 539, and outside the four narrow exceptions enunciated in that opinion. Specifically, we determined that only the so-called *Cantrell-Thornton* exception was potentially available (*People* v. *Cantrell* (1973) 8 Cal.3d 672 [105 Cal.Rptr. 792, 504 P.2d 1256]; *People* v. *Thornton* (1974) 11 Cal.3d 738 [114 Cal.Rptr. 467, 523 P.2d 267])—viz., that intent to kill was established as a matter of law and there was no contrary evidence worthy of consider-

[*]At this point the opinion notes: "Crawford had testified for the prosecution and had identified photos that showed drag marks from the roadway to where the body had been found. The drag marks appeared to start on the pavement." (41 Cal.3d at p. 419, fn. 7.)

ation. We then determined that the evidence adduced at trial showed that the exception was in fact not available here. Accordingly, we vacated the special circumstance findings and reversed the judgment as to penalty.

Thereupon the Attorney General filed his petition for a writ of certiorari on the issue whether the failure to instruct on intent to kill with regard to a felony-murder special circumstance is subject to harmless-error analysis. The high court granted the petition, vacated the judgment in *Hamilton I*, and remanded the cause to this court for further consideration in light of its decision in *Rose* v. *Clark*, *supra*, 478 U.S. 570 [92 L.Ed.2d 460, 106 S.Ct. 3101].

C. *The Cause on Remand*

At the threshold, we must delineate the scope of review on remand.

(1) Contrary to the parties' assumption, the cause in its entirety is properly before us. This is so because the United States Supreme Court vacated the judgment in *Hamilton I* and rendered the decision a nullity. Also contrary to the parties' assumption, the doctrine of law of the case does not bar reconsideration of any point decided in *Hamilton I*. The doctrine may be applied only when and to the extent the prior decision has binding force. (See *City of Oakland* v. *Oakland W. Etc. Co.* (1912) 162 Cal. 675, 677-678 [124 P. 251] [prior decision binding on points concurred in by the requisite number of judges, not binding on others].) Because the judgment in *Hamilton I* was vacated, that decision, of course, is a nullity and as such has no binding force.

1. *Guilt Issues*

Pursuant to the mandate of the United States Supreme Court referred to above, we have reexamined that part of our former opinion dealing with the issues relating to guilt. (*Hamilton I*, *supra*, 41 Cal.3d at pp. 419-431.) Inasmuch as we deem it unnecessary to alter or amend our prior decision in that regard, we adopt it as our decision in this proceeding.

2. *Special Circumstance Issues*

(2) Renewing the point he made in *Hamilton*, defendant contends the court erred by failing to instruct the jury that intent to kill was an element of the felony-murder special circumstance. The claim must be rejected.

In *People* v. *Anderson*, *supra*, 43 Cal.3d at page 1147, we held that the court must instruct on intent when there is evidence from which the jury

13

could find that the defendant was an aider and abettor rather than the actual killer. In this case, of course, all the evidence showed that defendant either actually killed Buchanan or was not involved in the crime at all; there was no evidence that he was an aider and abettor. Thus, the court did not err by failing to instruct on intent.

Since we have concluded that the court was not obligated to instruct on intent, we are not required to reach the issue to which the high court's remand order directed us—i.e., whether the failure to instruct on intent is subject to harmless-error analysis—and accordingly decline to do so.[7]

3. *Penalty issues*

At the penalty phase the prosecution presented evidence to show that defendant, who was 29 years of age at the time of trial in 1981, had been involved in serious criminal activity virtually all his adult life. It was stipulated that defendant had suffered felony convictions for the following offenses: a 1971 forgery, two 1972 burglaries, a 1976 auto theft, and a 1976 Louisiana burglary.

The prosecution presented evidence that defendant robbed one Ruth Story on November 17, 1976. On that date, Story was about 55 years old and walked with a cane. As she was returning home from a store, she encountered a man and woman whom she did not know. The man knocked her to the ground and attempted to take her purse from her shoulder; she tried to get up, he pulled her into the street; she again tried to get up, he again knocked her to the ground and then pulled her onto the sidewalk, took her purse, struck her three times in the face with his fist causing serious injuries, and thereupon fled with his woman companion.

While he was in custody in Louisiana for his 1976 burglary, defendant wrote to Officer Patrick Birse of the San Diego Police Department. In his letter he complained that the Louisiana authorities had "railroaded" him and were subjecting him to physical abuse; stated that he wished to return to the San Diego area, confessed to the Story robbery, and requested that Birse urge the district attorney to have him extradited.

Subsequently, the San Diego police showed Story a photographic lineup in which defendant's picture appeared. Story identified defendant as the

[7] Defendant also contends the felony-murder-burglary special-circumstance finding must be set aside on the ground that the death penalty law does not include the burglary of a vehicle within the scope of this special circumstance. Because he has failed to show that the other special circumstance findings are invalid on any ground, defendant is properly death-eligible. (Pen. Code, § 190.2, subd. (a).) Hence, we need not reach this issue.

perpetrator, stating she was "about 80 percent certain." At a live lineup, however, Story failed to identify defendant as the perpetrator. She similarly failed to identify him at the preliminary hearing. Nevertheless, defendant was held to answer.

Not long after the preliminary hearing, defendant wrote to Story. In his letter he stated, "I know you don't know me personally, but I am the man accused in that November 1976 incident where you were robbed and hurt." He then said that he had made the confession in his letter to Officer Birse solely to be extradited from Louisiana, and that the confession was not true. Finally, he asked her help in clearing him of the robbery charge.

A few days later, defendant wrote to the San Diego District Attorney. In his letter, he said that he had made his confession as a result of coercion and was innocent of the robbery charge, and that it was in the office's best interests to dismiss the case. He added: "Your victim definitely knows me Personally and intimately. Back in 1967-68 and '69, when I was just a young buck, she used to pay me for my sexual services. . . . She is an alcoholic and sex freak, which is no crime, but the fact is, she knows me and would therefore would [sic] know if I was the one who robbed her, of [sic] which she has already said I wasn't."

At the penalty phase, Story identified defendant as her assailant. She stated: "The way [defendant] sets his mouth looks very much the same as the man set his mouth when he hit me."

The prosecution called one Ronie Blackmon to prove that she had twice suffered battery at defendant's hands. Blackmon testified that from late 1978 to early 1979 she and defendant were lovers; she worked driving a taxi cab, and was studying to become a truck driver; the pair discussed marriage, but defendant stated he did not want his wife to drive trucks; one morning in February 1979, defendant prevented her from going to truck driver school by beating her about the head with his fist, and she subsequently ended their relationship; a couple of weeks later, defendant accosted her at her place of employment, she responded she had nothing to say to him, and he then knocked her down with a punch to the head and proceeded to kick her head, face, and arms.

The prosecution also presented evidence that on the morning of October 8, 1980, deputy sheriffs made a number of unsuccessful attempts to get defendant out of bed to attend trial; finally, defendant jumped to his feet, raised his fists to the deputies, resisted their efforts to take him to court, yelled obscenities, and spat in one deputy's face. Defendant attempted to show that he had been provoked and was subjected to excessive force.

15

In its case, the defense presented evidence to portray defendant as a human being and thereby move the jury to exercise mercy. In substance the evidence presented consisted of the testimony of family members and friends who asked that the jury spare defendant's life. These witnesses recalled defendant's religious upbringing, spoke of his human side, and recounted how he had been affected by the death of his younger brother.

b. Right to Self-representation

Defendant contends that he was denied his constitutional right to represent himself at the penalty phase in violation of *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]. Specifically, he claims the court erred by denying a motion he filed on December 27, 1980, in which he requested that the court "relieve counsel or in the alternative permit defendant [to] represent himself."

To properly address the contention, we must summarize certain events that occurred before the court made the ruling at issue. Evidently at arraignment on July 12, 1979, Patrick O'Connor was appointed to represent defendant. On September 25, 1979, on defendant's motion O'Connor was relieved on the ground of incompatibility, and Jerome Wallingford was appointed in his place. On November 7, 1979, dissatisfied with the representation that Wallingford was providing, defendant again made a motion to relieve counsel. Wallingford joined in the motion; the court, however, denied the request. On November 26, 1979, apparently on defendant's motion Wallingford was relieved and Thomas Ryan and Vivian Camberg were appointed in his place. On May 1, 1980, defendant filed a motion requesting that the court relieve Ryan and Camberg and permit him to represent himself. At a hearing on May 9, 1980, defendant withdrew his motion and made a new motion requesting that the court appoint him as cocounsel; the court granted this request. On May 20, 1980, defendant, complaining of their performance, again moved to have Ryan and Camberg relieved and to be permitted to represent himself. Finding inter alia that defendant did not have "a legitimate objection, but [was] only grasping at anything he can think of to delay the proceedings," the court denied the motion.

On October 2, 1980, trial commenced with jury selection. On October 14, 1980, defendant again filed a motion to represent himself. On October 20, 1980, however, he asked that his motion be taken off calendar, stating as follows: "I looked at the problems involved and I feel that [they are] mostly misinterpretations and misunderstandings that possibly could be worked out . . . . I don't want new counsel and then again I don't think pro. per. is the answer to my problems I have right now." On November 3, 1980, defendant revived his motion, claiming essentially that counsel's performance was inadequate in several particulars. Counsel responded with apparently satisfactory explanations on all counts. Finding inter alia that counsel "have done everything possible as far as I have been able to ascertain in the proper representation of Mr. Hamilton," and that defendant had a "proclivity to substitute counsel," the court denied the motion. Later that same day, the guilt phase began with preinstructions to the jury. On November 17, 1980, and December 8, 1980, defendant renewed his request to represent himself, each time without success. On December 9, 10, 12, and 15, 1980, defendant made a variety of complaints about counsel's performance, but was unable to persuade the court that any of them had merit. On December 16, 1980, the jury commenced deliberations.

On January 6, 1981, the jury returned its guilt phase verdicts and defendant filed the motion now in issue—viz., the request that "the court relieve counsel or in the alternative permit defendant [to] represent himself" during the penalty phase. The motion was based on the ground that counsel performed inadequately and failed to adopt the strategy and tactics defendant had proposed. That same day, the court appears to have summarily denied the motion.

At a hearing on January 15, 1981—five days before the penalty phase opened—defendant renewed his motion. Again, the court denied his request. In so ruling it stated as follows.

"I have had the opportunity to see this case from beginning to end and I think that Mr. Ryan and Miss Camberg have done an outstanding job in their representation of the defendant in the face of real adversity through Mr. Hamilton putting stumbling blocks in their path at almost every turn. [¶] It is almost as if Mr. Hamilton were attempting to sabotage his case. [¶] The complaints that Mr. Hamilton has made are, I find, totally and completely without merit.

"I think it would be a real travesty and a mockery if I were to permit Mr. Hamilton to represent himself. He has had violent confrontations with the deputies in the jail. He has had violent confrontations with other persons.

"I have found it necessary for Mr. Hamilton to be handcuffed and in shackles, in effect during the entire trial because I was, frankly, concerned about violence here in the courtroom, about his attacking anybody that might be immediately at hand, and I can assure you that I would be the most disturbed person in the world if I hadn't required that he be in shackles and somebody, either his attorneys or somebody close to Mr. Hamilton in the courtroom were seriously injured.

17

"I don't see that there is any change. I don't feel there is any change whatever in my feeling relative to Mr. Hamilton representing himself. He certainly can't represent himself, being in chains.

"Certainly, he'd be in an awfully awkward position to be attempting to roam around the courtroom with his exhibits in the condition he is in, and I am certainly not going to release him from the shackles during the balance of the trial.

"I can only say that Mr. Hamilton has done many things that he shouldn't have done during the course of the trial. He has seemed to, as I have indicated, put stumbling blocks in the path of his attorneys. He has made suggestions which were absolutely preposterous as far as trial tactics are concerned, and if he had followed those tactics, it would have been even, I mean, the result would have been absolutely disastrous from his standpoint of the presentation.

"I can't conceive of Mr. Hamilton representing himself in this final phase, the penalty phase of the trial, the portion of the trial which is going to determine whether he is sentenced to life imprisonment or whether he is sentenced to death. I think it would be a real travesty if I were to do otherwise."

In *People* v. *Windham* (1977) 19 Cal.3d 121 [137 Cal.Rptr. 8, 560 P.2d 1187], we held that "in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial. Accordingly, when a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be. Furthermore, the defendant's 'technical legal knowledge' is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself. [Citation.] However, once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court. When such a midtrial request for self-representation is presented the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or

delay which might reasonably be expected to follow the granting of such a motion. Having established a record based on such relevant considerations, the court should then exercise its discretion and rule on the defendant's request." (*Id.* at pp. 127-129, fns. omitted.)

We are of the opinion that the court's denial of the motion in question was not error. (3a) Because defendant's request was filed in the midst of the jury's guilt phase deliberations, it was not timely for purposes of invoking an absolute right of self-representation under *Faretta* v. *California*, *supra*, 422 U.S. 806. (*Hamilton I*, *supra*, 41 Cal.3d at p. 421 [motion made after jury selection but before opening statements held untimely].) Accordingly, it was within the court's discretion to grant the request or not. (4) On review we cannot conclude that the court abused its discretion in denying the motion: having considered the *Windham* factors, the court made the reasonable determination that defendant should not be permitted to represent himself at the penalty phase. The fact that the court considered such irrelevant factors as defendant's inability "to roam around the courtroom" in shackles and his lack of competence in law does not undermine the soundness of its determination.

(3b) Defendant claims that his *Faretta* motion was indeed timely and hence effectively invoked an unconditional right of self-representation. He argues that the penalty phase of a capital trial amounts in actuality to a separate trial, and that he made his motion within a reasonable time prior to the commencement of that phase. We must reject the point because its predicate is unsound.

First, as even defendant acknowledges, the penalty phase has no separate formal existence but is merely a stage in a unitary capital trial. Second and more important, the connection between the phases of a capital trial is substantial and not merely formal. For example, Penal Code section 190.4, subdivision (c), provides that as a general matter "If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to [Penal Code] Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied . . . ." Subdivision (d) of that same section declares that "In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase."

Thus, we conclude that defendant was not denied a constitutional right of self-representation.

19

b. *Constitutionality of the Sentencing Formula of Penal Code Section 190.3*

(5) Defendant contends that the sentencing formula of Penal Code section 190.3 (hereafter section 190.3) is unconstitutional on the ground that it withdraws from the trier of fact constitutionally compelled discretion and thereby undermines the reliability of the verdict. Section 190.3, subdivision (k) states in relevant part that "the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." The point defendant makes here, however, was rejected in *People* v. *Brown* (1985) 40 Cal.3d 512, 538-544 [220 Cal.Rptr. 637, 709 P.2d 440], reversed on other grounds *sub nomine California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837].

c. *Brown Error*

(6) Defendant may be understood to contend that former CALJIC No. 8.84.2, incorporating the mandatory sentencing language of section 190.3, may have misled the jurors to his prejudice as to the scope of their sentencing responsibility and discretion in violation of the constitutional principles set forth in *People* v. *Brown*, *supra*, 40 Cal.3d at pages 538-544.

In *Brown* we held that section 190.3, as construed therein, was not unconstitutional. (40 Cal.3d at pp. 538-544.) In conformity with settled constitutional principles, we interpreted the statutory language to require jurors to make " . . . 'an individualized determination on the basis of the character of the individual and the circumstances of the crime' " (id. at p. 540, italics deleted) and a "' . . . moral assessment of [the] facts . . .' " (*ibid.*)—and thereby decide "which penalty is appropriate in the particular case" (*id.* at p. 541).

Although in *Brown* we upheld the constitutionality of section 190.3, we nevertheless recognized that when delivered in an instruction the provision's mandatory sentencing language might mislead jurors as to the scope of their sentencing discretion and responsibility. (40 Cal.3d at p. 544, fn. 17.) Specifically, we believed that a juror might reasonably understand that language to define the penalty determination as "simply a finding of facts" (*id.* at p. 540) or "a *mere* mechanical counting of factors on each side of an imaginary 'scale' " (*id.* at p. 541). We also believed that a juror might reasonably understand the language to require him to vote for death if he finds that the evidence in aggravation outweighs the evidence in mitigation—even if he determines that death is not the appropriate penalty under all the

circumstances. (See *id.* at pp. 540-544.) For this reason we directed trial courts thereafter to instruct jurors in conformity with the principles set forth therein, rather than in the bare words of the statute. (*Ibid.*) With respect to cases—such as the present—in which the jurors had been instructed in the statutory language, we announced that we would examine each such appeal on its merits to determine whether the jurors may have been misled to the defendant's prejudice. (*Ibid.*)

We turn now to the case at bar. After reviewing the record of the penalty phase in its entirety, we cannot conclude that the jurors may have been misled to defendant's prejudice by former CALJIC No. 8.84.2. Indeed, we believe that they were adequately informed as to what they were to do, and how they were to proceed, in the determination of penalty, and that neither concern expressed in *Brown* was substantially implicated. In support we make the following observations. First, although in closing argument the prosecutor referred briefly to the mandatory sentencing language, he clearly acknowledged that the jurors were "called upon to make the tremendous decision, tough decision," and were given discretion by the law to that end. Second, in his closing argument defense counsel emphasized that it was the responsibility of the jurors, and the jurors alone, to determine whether the death penalty was appropriate for defendant. Third, at defendant's request the court instructed the jurors as follows: "In weighing the aggravating and mitigating factors, you are not to merely count numbers on either side. You are instructed rather to weigh and consider the factors on each side as a whole"; and, "In order to impose a death sentence, you must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh[s] the totality of the mitigating circumstances."

Thus, on this record we find no *Brown* error.

d. *Easley "Factor (k)" Error*

(7) Defendant may be understood to contend that the pre-*Easley* (*People* v. *Easley* (1983) 34 Cal.3d 858 [196 Cal.Rptr. 309, 671 P.2d 813]) CALJIC No. 8.84.1 (k) instruction (hereafter former factor (k)), which was given in this case, may have misled the jurors as to the scope of their sentencing responsibility and discretion to defendant's prejudice.

Pursuant to former CALJIC No. 8.84.1, the court instructed the jurors that in determining the penalty they should consider several specified circumstances and also "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

In *People* v. *Easley*, *supra*, 34 Cal.3d 858, we concluded that the language of former factor (k) might mislead the jurors about the scope of their

21

discretion and responsibility under the federal Constitution as construed in *Lockett* v. *Ohio* (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973, 989-990, 98 S.Ct. 2954], and *Eddings* v. *Oklahoma* (1982) 455 U.S. 104, 110 [71 L.Ed.2d 1, 8, 102 S.Ct. 869], in which the United States Supreme Court held that a sentencer may "'not be precluded from considering as a *mitigating factor*, any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" (Italics in original.)

Because of the potentially misleading language of the instruction, we directed trial courts thereafter to inform the jury that they may consider in mitigation not only factor (k) but also "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" (34 Cal.3d at p. 878, fn. 10.)

In *People* v. *Brown*, *supra*, 40 Cal.3d 512, we announced that with respect to cases—such as the present—in which the jury had been instructed pursuant to the former factor (k), we would examine each such appeal on its merits to determine whether the jury may have been misled to the defendant's prejudice. (*Id.* at p. 544, fn. 17.) In conducting such an examination, we look to "'the totality of the penalty instructions given and the arguments made to the jury' . . . ." (*People* v. *Rodriguez* (1986) 42 Cal.3d 730, 786 [230 Cal.Rptr. 667, 726 P.2d 113].)

We turn now to the case at bar. After reviewing the record of the penalty phase in its entirety, we cannot conclude that the jurors may have been misled to defendant's prejudice by the former factor (k) instruction. Indeed, we are of the opinion that the jurors were in fact adequately informed that they could consider character and background evidence. After the defense presented a case that consisted entirely of such evidence, the court instructed the jurors as follows: "The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Hamilton. You should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances presented as reasons for not imposing the death sentence."

Thus, on this record we find no *Easley* "factor (k)" error.

e. *Ramos Error*

(8) Defendant contends that the court committed reversible error under *People* v. *Ramos* (1984) 37 Cal.3d 136 [207 Cal.Rptr. 800, 689 P.2d 430]. In accordance with the so-called Briggs Instruction (former CALJIC No

8.84.2 (1979)) the court delivered the following charge: "You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole."

In *People* v. *Ramos*, *supra*, 37 Cal.3d at page 153, we held that "the Briggs Instruction is incompatible with [the] guarantee of 'fundamental fairness' [established in the due process clauses of our Constitution (Cal. Const., art. I, §§ 7, 15)] both because it is seriously and prejudicially misleading and because it invites the jury to be influenced by speculative and improper considerations."

As to the misleading character of the instruction, we stated as follows: "Under the California Constitution, the Governor's power of commutation or pardon extends equally to a sentence of death and to a sentence of life without possibility of parole. [Citation.] The Briggs Instruction, however, informs the jury only that a sentence of life without possibility of parole may be commuted. Although the instruction is literally accurate as far as it goes, it is a classic example of a misleading 'half-truth.' Since the instruction is only given in a penalty trial—when the jury's attention is narrowly focused on two alternative punishments—the instruction would reasonably be understood by the average juror to mean, by negative implication, that while a sentence of life without possibility of parole may be commuted, a sentence of death may not. Viewed realistically and in context, the instruction provides the jury with seriously misleading information." (37 Cal.3d at p. 153, fn. omitted.)

Further, we explained that "there are a variety of reasons why . . . consideration [of the commutation power] is improper. The first and perhaps most obvious problem is the speculative nature of the inquiry that the instruction invites. . . . [¶] . . . Here, the jury must attempt to determine not only what a particular defendant will be like in the future but also what some presently unknown person—a future Governor—will do in response to the defendant's then condition. . . . [¶] Furthermore, . . . any instruction which draws the jury's attention to the possibility of future actions by a governor or parole board is likely to affect the jury's decisionmaking process in either of two illegitimate—though very different—ways, diverting the jury from its proper function. [¶] The first vice of such an instruction . . . is that it may tend to diminish the jury's sense of responsibility for its action." (*Id.* at pp. 156-157.) "Second, . . . an instruction on the possibility of commutation invites the jury to go beyond its proper role and attempt to 'preempt' the Governor's constitutional authority by imposing a sentence

23

that will at least minimize the opportunity for such a commutation." (*Id.* at p. 158.)

Under *Ramos*, we conclude that the court erred by charging the jury in accordance with the Briggs Instruction: the language of the instruction is misleading and invites speculation on irrelevant and improper matters.

The Attorney General argues in substance that a supplementary charge, delivered by the court immediately after the Briggs Instruction, made that instruction nonerroneous or in any event nonprejudicial. As relevant here, the court's full instructions were as follows:

"It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on Mr. Hamilton.

"You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole. This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one third off for good time credits before parole may be considered by the proper authorities.

"You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur. It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can be safely released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the governor and other officials will properly carry out their responsibilities."

Having considered the matter closely, we cannot agree that the supplementary charge somehow rendered the Briggs Instruction free of error: that charge drew out after the objectionable language, which continues to mislead and to invite speculation on irrelevant and improper matters.

We do agree, however, that on this record the error was nonprejudicial. As stated above, the court instructed the jurors "not to consider[]" "the matter of a possible commutation or modification of sentence . . . in determining the punishment for Mr. Hamilton," "not [to] speculate as to whether such commutation or modification would ever occur," and "not . . . to decide now whether this man will be suitable for parole at some future date." Defendant argues that the supplementary charge did not cure the harm of the Briggs Instruction, but rather led the jurors to indulge in irrelevant and improper speculation. The clear meaning of the plain words of the admonition, however, refutes this argument.

The court also delivered the following charge: "I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. Those are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case."

Through these instructions, the court directed the jurors not to make any use of the Briggs Instruction in determining the penalty to be imposed on defendant. Jurors are, of course, presumed to follow the instructions given by the court. (E.g., *Delli Paoli v. United States* (1957) 352 U.S. 232, 242 [1 L.Ed.2d 278, 285-286, 77 S.Ct. 294].) In this case we find no reason to believe that the jurors failed to discharge their duty.

Defendant argues in substance that the prosecutor explained the Briggs Instruction in closing argument and thereby made the harm threatened by the instruction incurable. The comment complained of is as follows: "Now, [defense counsel will] say, 'If you give him life in prison, he will have to spend the rest of his days thinking about his crimes and thinking about the victims.' No way. . . . This defendant wouldn't spend all his time in prison thinking about his horrible crime. He's be conniving and devising ways to manipulate the system and get out. Look at his letters [to Officer Bova, Ruth Story and the San Diego District Attorney's office] now, how he operates."

We do not believe that the prosecutor intended this comment to refer to the Briggs Instruction. Had he devised to anticipate that charge, he would

25

evidently have touched on the Governor's commutation power expressly or at least by clear implication. But as the words of the remark show, he did not do so. More important, we do not believe that the jury would have understood the comment to refer to the instruction. the remark does not even allude to the commutation power. In any event, the comment was brief and isolated. As such, it could not make the error in this case incurable.

Hence, we conclude that on the facts of this case the giving of the Briggs Instruction did not amount to reversible error.

f. Consideration of Invalid Felony-murder-burglary Special Circumstance

(9) Defendant contends that the felony-murder-burglary special-circumstance finding was invalid (*see ante*, fn. 7) and, as such, was improperly presented to the jurors as evidence in aggravation under the instruction directing them to consider "the existence of any special circumstance found to be true." He then contends that the error requires reversal. We cannot agree. Assuming for argument's sake that the finding was invalid, we are nevertheless of the opinion that even if the jurors had not been instructed to consider the existence of this finding, they still would have returned a verdict of death. whereas the evidence in aggravation—even without the finding—was overwhelming, the evidence in mitigation was minimal.

g. Failure to Exercise Discretion to Strike the Special Circumstance Findings

Defendant contends in substance that at the automatic penalty-modification hearing conducted pursuant to Penal Code section 190.4, subdivision (e), the court had the authority, under Penal Code section 1385 (hereafter section 1385), to strike the special circumstance findings "in furtherance of justice" in order that he might be eligible for parole. He further contends that the court failed to consider whether it should exercise that authority.

(10) We agree that under the 1978 death penalty law the court had the authority to strike the special circumstance findings pursuant to section 1385. Indeed, we so held in *People v. Williams* (1981) 30 Cal.3d 470 [179 Cal.Rptr. 443, 637 P.2d 1029].

We cannot agree, however, that the court failed to consider whether it should exercise this authority. On our reading of the record, the court appears to have impliedly determined that there was no basis for striking the special circumstance findings. As the court expressly found, "the evi-

dence in aggravation is overwhelming and the evidence in mitigation is virtually nonexistent."

Defendant argues in substance that the court may nevertheless have entertained the erroneous belief that it was without authority to strike the special circumstance findings, and that it should be directed to determine whether or not there was a basis to strike those findings. We are not persuaded. The record contains no evidence suggesting that the court believed it was without such authority. In the absence of such evidence, we are unwilling to assume that the court may have entertained an erroneous belief as to the scope of its powers. We presume the court was aware of the general rule that section 1385 authorizes the court to dismiss "in furtherance of justice" in any circumstance in which the legislative body has not clearly manifested a contrary intent. (*People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 503-505 [72 Cal.Rptr. 330, 446 P.2d 138] [dismissing entire action].) We also presume the court read the death penalty law, as we subsequently did in *People v. Williams, supra*, 30 Cal.3d at pages 484-485, as not intended to limit the court's authority in the circumstances relevant here. Accordingly, we cannot conclude that the court erroneously believed it was without authority to strike the special circumstance findings under section 1385.

(11) Finally, we are of the opinion that in view of the theories presented and the evidence introduced, the jury's guilt phase verdicts imply a finding that defendant was the actual killer (*Enmund v. Florida* (1982) 458 U.S. 782, 788-801 [73 L.Ed.2d 1140, 1145-1154, 102 S.Ct. 3368]). Having reviewed the record in its entirety, we conclude that this finding is amply supported by the evidence and adopt it as our own. Accordingly, we hold that the imposition of the penalty of death on defendant does not violate the Eighth Amendment. (*Cabana v. Bullock* (1986) 474 U.S. 376, 386 [88 L.Ed.2d 704, 716, 106 S.Ct. 689, 697].)[*]

II. HABEAS CORPUS (CRIM. 25303)

In his petition for a writ of habeas corpus in Crim. 25303, defendant bases his claim to relief on three grounds. He first asserts he was not provided with effective assistance by trial and appellate counsel. (12) To establish such a point, a defendant must show that counsel (1) performed at a level below an objective standard of reasonableness under prevailing professional norms; and thereby (2) subjected the defense to prejudice, i.e., in

[*] After oral argument defendant submitted a number of motions to preparte persons asking that appointed appellate counsel be relieved and other specified counsel be substituted in his place. Because each of these attorneys has declined to state he is available or has declared he is unavailable, we deny the motions.

27

the absence of counsel's failings a more favorable outcome was reasonably probable. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 216-218 [233 Cal.Rptr. 404, 729 P.2d 839].) As we shall explain, defendant fails to make a prima facie case of entitlement to relief.

(13) Defendant alleges broadly that trial counsel made various errors in strategy and tactics and, more specifically, that they feared him and treated him with distrust. Such assertions do not effectively allege either deficient performance or prejudice.

He also alleges appellate counsel refused to argue that facial expressions and gestures trial counsel assertedly made during jury selection prejudiced the defense. This statement too fails to effectively allege either deficient performance or prejudice.

Defendant next claims that he was denied due process because the trial judge was biased. In support of his point, he cites the following incidents: (1) in an in camera hearing the judge stated he believed trial counsel and did not believe defendant in a dispute as to whether counsel had threatened him with harm, and (2) in another in camera conference, the judge told him, "You have proven yourself an unmitigated liar during the course of this whole trial." (14) But the fact that the judge made these statements—much of which is more than adequately supported by the evidence—does not amount to a prima facie showing of bias. "'[W]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and evidence given during the trial of an action, it does not amount to . . . prejudice . . . .'" (*People* v. *Yeager* (1961) 55 Cal.2d 374, 391 [10 Cal.Rptr. 829, 359 P.2d 261].)

Defendant's final "claim" is in substance as follows: he wants that at the new trial that might have followed our decision in *Hamilton I* the court would again deny his request to represent himself. Whether or not the court would so rule in the future raises no issue cognizable on habeas corpus. In any event, because we affirm the judgment in its entirety there will be no such new trial.

III. HABEAS CORPUS (S001870)

In his petition for a writ of habeas corpus in S001870, defendant bases his claims to relief on what are in substance four grounds. He first asserts he was not provided with effective assistance by trial and appellate counsel,[As will appear, he fails to make a prima facie case.

To begin with, we seriously doubt defendant has adequately alleged deficient performance on the part of counsel. His first complaint is that

counsel failed to communicate with him or to allow him to participate in the development of strategy and tactics. The charge, however, is conclusory and without specificity. The second complaint is that counsel failed to fully investigate the facts of the case. This charge runs in substance as follows: Buchanan, as is undisputed, left class on the night of May 30, 1979, before an optional quiz was given, a copy of that quiz was subsequently found in the van, that copy—defendant conjectures—must have been brought to the van by one of Buchanan's classmates; that classmate—defendant declares—may have been the killer; counsel knew that Buchanan had left class before the quiz was given, and knew that a copy of the quiz was found in the van, therefore, counsel should have sought evidence about the classmate. We doubt, however, that counsel's performance can be called deficient. There was simply nothing more than the merest speculation that an unknown classmate may have gone to the van and may have killed Buchanan. Without something more, it is difficult to conclude that counsel was obligated to investigate further.

In any event, we are of the opinion that defendant has not adequately alleged prejudice. Indeed, he has wholly failed to show that absent counsel's alleged failings a more favorable outcome in the guilt phase was reasonably probable on the facts of this case.

Defendant next claims that the prosecution introduced "False evidence . . . substantially material or probative on the issue of guilt" (Pen. Code, § 1473, subd. (b)(1)). His complaint is in essence as follows: the optional quiz must have been brought into the van by one of Buchanan's classmates; the prosecution was aware of this fact, but presented its case as though Buchanan brought the quiz to the van herself. The premise is unsound: the record establishes that after class Buchanan spoke with friends who had taken the quiz, probably obtained a copy from one of them, and therefore may have brought it to the van herself. Hence, defendant fails to make a prima facie case.

(15) Defendant also claims that he had a right to be present at a pretrial hearing conducted on July 6, 1981. At that hearing, the court in essence established a schedule under which a defense criminologist could examine the van, which was then in storage in Oklahoma, before it was driven back to California by agents of the prosecution. Again, as will appear, no prima facie case is made.

It is the rule that "the accused is not entitled to be personally present . . . [on] matters in which defendant's presence does not bear a '"reasonably substantial relation to the fullness of his opportunity to defend against the charge."'" (*People* v. *Jackson* (1980) 28 Cal.3d 264, 309 [168 Cal.Rptr.

29

603, 618 P.2d 149], citing cases (plur. opn.).) Under this rule, defendant did not have a right to be present at the hearing: his attendance at what was essentially a scheduling hearing would not have been useful or of benefit to the defense.

(34) Defendant's final claim is that the prosecution interfered with his attempt to obtain evidence. Specifically, he charges that the prosecution had the van examined and cleaned before the defense criminologist could subject it to inspection and tests. It is of course the rule that "in no event can duly constituted authority hamper or interfere with efforts on the part of an accused to obtain [evidence] . . . , without denying him due process of law." (*In re Morton* (1962) 58 Cal.2d 309, 312 [24 Cal.Rptr. 833, 374 P.2d 801] [blood sample to determine intoxication].) The petition, however, fails to adequately allege interference: it states that the prosecution had the van examined and cleaned before the defense criminologist could begin his work; it does not state that the criminologist acted without undue delay or that the delay on his part was attributable to the prosecution.

The judgment is affirmed. The petition for writ of habeas corpus in Crim. 25303 is denied. The petition for writ of habeas corpus in S001870 is denied.

Lucas, C. J., Panelli, J., Arguelles, J., Eagleson, J., and Kaufman, J., concurred.

BROUSSARD, J.—Concurring and dissenting.—I concur in the affirmance of the findings of guilt and special circumstances and in the denials of the petitions for writ of habeas corpus. I dissent from the affirmance of the death penalty.

The majority properly conclude that the trial court erred in giving an instruction in accordance with the so-called Briggs Instruction (former CALJIC No. 8.84.2 (1979)) on the Governor's power to commute a sentence of life without possibility of parole. (*People v. Ramos* (1984) 37 Cal.3d 136, 153 [207 Cal.Rptr. 800, 689 P.2d 430].) As the majority recognize, the language of the instruction is misleading and invites speculation on irrelevant matters. However, the majority also conclude that subsequent instructions telling the jury to disregard the Governor's power to commute eliminated any prejudice. I do not agree.

In my view the error was prejudicial. I cannot agree that the later instructions unrung the bell. Far from unringing the bell, the subsequent instructions could only have the effect of reminding the jury again and again of the Governor's commutation power. Furthermore the prosecutor exploited the error in closing argument. To conclude that, when the cacophony was

complete and overwhelming, there was no prejudice is to turn a deaf ear to fairness and justice.

The Briggs Instruction has been uniformly held to be prejudicial error in a penalty trial because it is so misleading as to constitute a denial of due process, improperly tilting the jury in favor of the death penalty. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1150-1151 [240 Cal.Rptr. 585, 742 P.2d 1306]; *People v. Myers* (1987) 43 Cal.3d 250, 272-273 [233 Cal.Rptr. 264, 729 P.2d 698]; *People v. Monteil* (1985) 39 Cal.3d 910, 928 [218 Cal.Rptr. 572, 705 P.2d 1248]; *People v. Haskett* (1982) 30 Cal.3d 841, 861-863 [180 Cal.Rptr. 640, 640 P.2d 776].) In *Anderson*, it is stated that the Briggs Instruction "necessarily subjects the defendant to prejudice." (43 Cal.3d at p. 1151.) As pointed out in *Myers*: "The Attorney General . . . has cited no instance, and we are aware of none, in which this type of instructional error has been found nonprejudicial in a death penalty case, and in view of the very serious potential for prejudice emphasized in *Ramos*, we strongly doubt whether we could ever confidently conclude that there was no reasonable possibility that this instruction improperly tainted the jury's decision-making process." (43 Cal.3d at p. 272.)

In *Myers*, the defendant introduced evidence of the past practices of California governors to show that it was extremely unlikely that he ever would be released if sentenced to life without possibility of parole. The court concluded that far from neutralizing the improper instruction "in reality the additional focus on commutation in this case had the inevitable and unfortunate effect of highlighting the ostensible importance of the commutation question." (43 Cal.3d at pp. 272-273.)

In this case the trial court's instruction to the jury that it was their duty to determine whether death or confinement in state prison without possibility of parole should be imposed on defendant was followed immediately by its instruction on the Governor's commutation power. The court thereby emphasized the importance of the instructions on the Governor's powers, suggesting that they are the first and most important step in the process of determining the penalty.[1]

[1] "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on Mr. Hamilton.

"You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

"This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation

The importance of the Governor's powers was further emphasized because of their length, the instructions went beyond those contemplated by Penal Code section 190.3, the *Briggs* Instruction.

The first instruction was not limited to the Governor's power to commute a sentence of life imprisonment without possibility of parole. Rather it spoke of the Governor's powers generally. Subsequent instructions told the jury of the Governor's power to commute a sentence of life imprisonment without possibility of parole to a sentence of life imprisonment with parole, a limitation on the power, and the effect of a commutation. The instructions did not stop with the instruction contemplated by Penal Code section 190.3 condemned in *Ramos* but repeatedly emphasized the Governor's power. The instructions thus were not the brief but invalid reference to the Governor's power contemplated by Penal Code section 190.3 but included in addition an instruction applicable to a death sentence and instructions detailing matters which could only serve to toll the bell repeatedly. While the majority concede that error occurred (maj. opn., p. 374), they do not recognize the full scope of the error.

The majority further take the position that subsequent instructions told the jury to disregard the prior instructions, that we must presume the jury followed the later instructions and that they eliminated the prejudice due to the erroneous instructions on the Governor's powers. (Maj. opn., *ante*, at p. 375.)

I doubt whether any instruction could eliminate the prejudice flowing from the improper and detailed emphasis placed on the Governor's commutation power. The power was given too much importance and emphasis to allow further instructions to eliminate the prejudice. Furthermore the subsequent instructions given in the instant case were in themselves erroneous, confusing and contradictory and, when all was said and done, probably left the jury with the view that it should consider the Governor's powers so long as it assumed that the powers would be properly exercised. Such instructions do not eliminate the prejudice flowing from the improper mention of the Governor's powers; they exacerbate the prejudice.[1]

---

of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one third off for good time credits before parole may be considered by the proper authorities."

[1]"You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr Hamilton. You must not speculate as to whether such commutation or modification would ever occur.

Like the evidence of past Governor practices in *People v. Myers, supra*, 43 Cal.3d 250, 272-273, the instructions relied upon by the majority in the instant case, far from neutralizing the improper instructions on the commutation power, served to emphasize the commutation question. The jury was initially told not to consider a possible commutation or to speculate whether there would be a commutation, and it was not its function to determine whether defendant would be suitable for parole at a later date. But telling the jury not to consider a *possible* commutation, to speculate, or to decide whether this man will be suitable for parole at some later date simply emphasizes the commutation question in the juror's mind.

Moreover, the jury was not told to ignore the Governor's power but was told that the Governor, the Supreme Court and the parole officials would properly perform their duties. In *Ramos*, after concluding that fundamental fairness precluded telling the jury of the commutation power, the court addressed the question whether the jury should be told *not* to consider the Governor's commutation power. While we recognized that in some circumstances not relevant here the jury might be told to disregard the power, we concluded that the jury should not be so instructed because the instruction "is simply more likely to bring the matter to the jury's attention and, as a practical matter, be difficult to follow." (37 Cal.3d at p. 159, fn. 12.) Accordingly, even if no commutation instruction had been given, it would have been error in the instant case to give the supplementary instructions because they called the jury's attention to the commutation issue. To conclude, as the majority do, that an instruction which is erroneous because it may call the jury's attention to a prejudicial matter somehow eliminates the prejudice in other instructions which call the jury's attention to the very same prejudicial matter involves a mental exercise incomprehensible to me.

But even if we accept the majority's thesis that somehow instructions which are error because of their prejudicial effect can somehow cure other instructions which are error because they have the same prejudicial effect, we still must look at the content of the subsequent instructions of the trial court.

"It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive.

"If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the Governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can be safely released into society.

"It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Governor and other officials will properly carry out their responsibilities." (Italics added.)

Far from being told that it was improper to consider the possibilities of commutation and subsequent parole, the jury was told that it should consider those possibilities but only in the perspective that, when and if defendant was paroled, it would be done lawfully. The instructions to disregard and not to consider were literally contradicted and the jury was left with not only erroneous instructions but also contradictory and confusing instructions as to the importance of the Governor's commutation power.

What did this jury do when faced with confusing and conflicting instructions concerning the Governor's commutation power? All we can do is guess. I suspect that the jury may have concluded that it should not try to determine whether this defendant would have his sentence commuted and obtain a parole but that it must conclude that the commutation power was a factor militating against life imprisonment without possibility of parole and in favor of the death penalty and that it must assume that if defendant was paroled it would be done lawfully. To execute a defendant based on the Governor's power to commute sentences whether done lawfully or unlawfully violates the fundamental fairness guaranteed by the due process clause of our state Constitution.

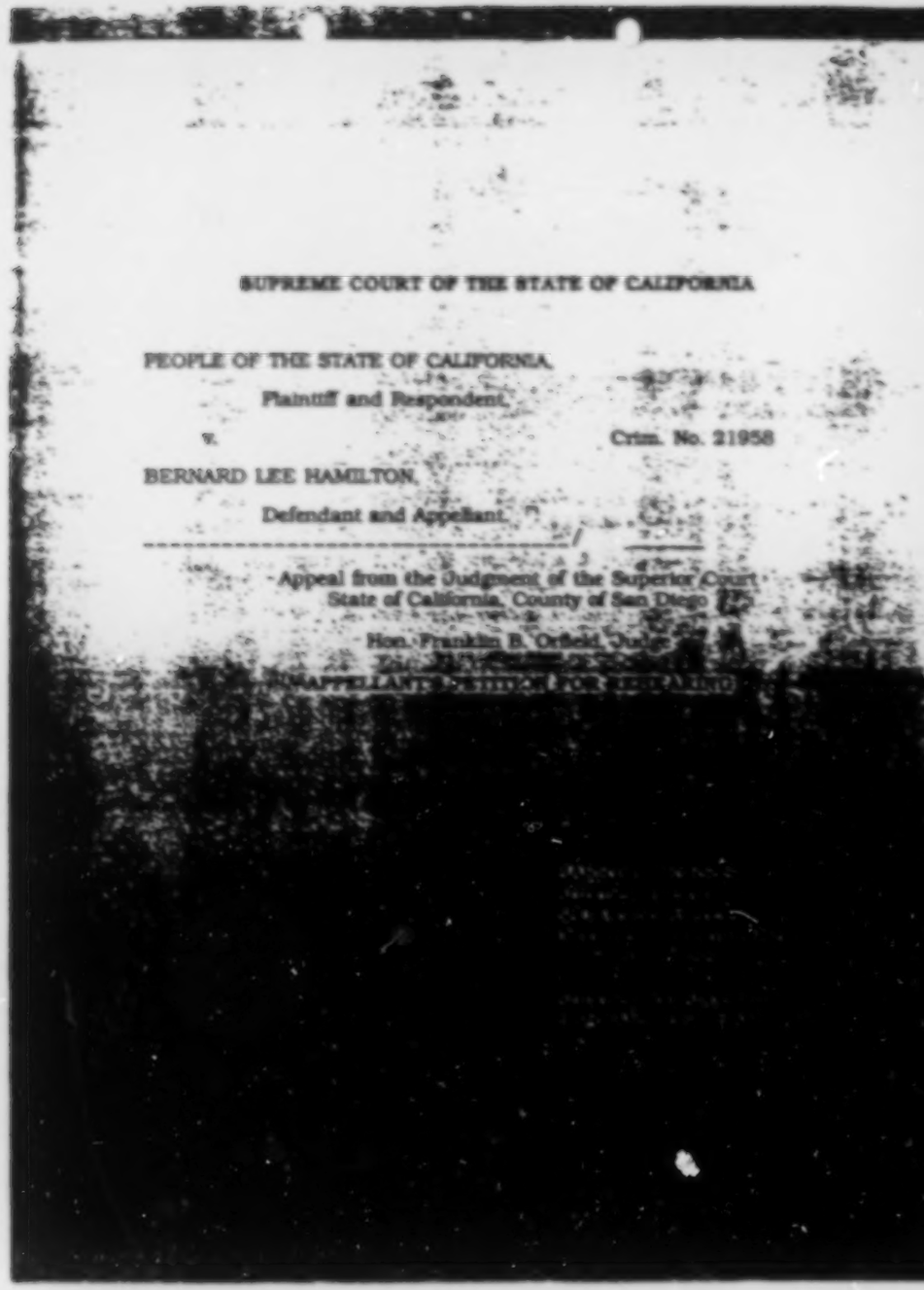
The prosecutor exploited the fundamental unfairness of the instructions in his closing argument. The prosecutor suggested that if defendant received a sentence of life imprisonment he "wouldn't spend all his time in prison thinking about his horrible crimes. He'd be conniving and devising ways to *manipulate the system and get out*. . . . Look at his letters [to Officer Birse, Ruth Story and the San Diego District Attorney's office] now, how he operates." (Italics added.) The comment is a direct comment on the possibility that defendant would be paroled. The only way that he could "manipulate the system and get out" by appealing to governmental authorities was through exercise of the commutation power. The majority suggest that the prosecutor was only trying to state that defendant was lacking in feeling and self-centered (maj. opn., p. 374), but the comment speaks for itself.

In the instant case the instructions discussing the Governor's powers were so long as those setting forth and defining the aggravating and mitigating circumstances which should control the application of the death penalty. I am satisfied that the instructions on the Governor's powers were more harmful than any we have seen in prior cases. The supplemental instructions relied upon by the majority did not eliminate the prejudice but could only have emphasized the commutation power and confused the jury into

believing that the power was an important matter, if not the most important matter, to be considered by the jury in determining the penalty. The prosecutor referred to possible parole in his closing argument, and the prejudice from the errors is overwhelming.

35

Relevant Portions of Petition for Rehearing



SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v. Crim. No. 21958

BERNARD LEE HAMILTON,

Defendant and Appellant.

Appeal from the Judgment of the Superior Court
State of California, County of San Diego
Hon. Franklin B. Orfield, Judge

APPELLANT'S PETITION FOR REHEARING

I

THE COURT SHOULD GRANT APPELLANT'S PETITION FOR A REHEARING BECAUSE THE COURT'S OPINION IS INCORRECT IN ITS ASSUMPTION THAT THE REMAND BY THE UNITED STATES SUPREME COURT FOR FURTHER CONSIDERATION IN LIGHT OF ROSE V. CLARK RENDERED THE COURT'S DECISION IN *PEOPLE V. HAMILTON I* (1985) 41 CAL.3d 408 A NULLITY

A

INTRODUCTION

This case was originally decided by this Court in *People v. Hamilton* (1985) 41 Cal.3d 408. Following the denial of respondent's petition for a rehearing, respondent filed a Petition for a Writ of Certiorari in the United States Supreme Court regarding the impact of *Cabana v. Bullock* (1986) 474 U.S. 376 on appellant's case. On April 18, 1988, Respondent filed an Application for Stay of Enforcement of Judgment with Justice Rehnquist, then Circuit Justice of the United States Supreme Court for the Ninth Circuit.

On May 6, 1986, Justice Rehnquist issued the requested stay, noting, *inter alia*,

> "This Court currently has before it the case of *Rose v. Clark*, No. 84-1974, which involves the question whether a *Sandstrom* error may ever be found harmless and, if so, under what circumstances. Our decision in *Rose v. Clark* may well affect the outcome of the instant case. For this reason, I believe that a majority of this Court would not want to dispose of the petition for certiorari in this case before a decision is rendered in *Rose v. Clark*."

Rose, *supra*, was decided on July 2, 1986, and five days later, the United States Supreme Court issued the following order in appellant's case:

> "The judgment is vacated and the case is remanded to the Supreme Court of California for further consideration in light of *Rose v. Clark*, 478 U.S.__(1986)"

B

THIS COURT'S OPINION IN *HAMILTON I* IS NOT A "NULLITY"

In its opinion in *Hamilton II*, this Court concluded that,

> "the United States Supreme Court vacated the judgment in Hamilton I and rendered the decision a nullity....Because the judgment in Hamilton I was vacated, that decision, of course, is a nullity and as such has no binding force." (Slip op. 15)

Simply put, the Court's conclusion is wrong. The United States Supreme Court has explicitly held that a remand for further consideration in light of an intervening case, "[does] not amount to a final determination on the merits." *Henry v. City of Rock Hill* (1964) 376 U.S. 776, 777 It follows that a remand which is not in itself a final judgment on the merits can hardly be said to render a final judgment a "nullity."

In *Henry*, *supra*, the Supreme Court had remanded a case to the South Carolina Supreme Court for, "further consideration in light of *Edwards v. South Carolina* 372 U.S. 229." The Court noted that,

> "That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration." *Id.* at 776

After noting that the remand "did not amount to a final determination on the merits," the Court added,

> "That order did, however, indicate that we found *Edwards* sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Id. at* 777

As one commentator put it,

> "[I]t seems fairly clear that the Court does not treat the summary reconsideration order as the functional equivalent of the summary reversal order..." Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th Ed. 1986) p. 280

The Fifth Circuit has similarly characterized the "reconsideration" order.

> "It is our understanding in this type of remand that the Court has merely 'flagged' this case as one upon which the intervening decision may have some bearing, but which the court has not conclusively determined to be materially affected thereby." *Bush v. Lucas* (5th Cir. 1981) 647 F.2d 573, 575

Similarly, the Ninth Circuit has rejected the conclusion that a remand for reconsideration in light of an intervening precedent is the equivalent of a summary reversal.

> "It would be all but impossible to distinguish between cases in which only reconsideration was intended and those in which reversal was thought proper. Consequently, our duty is to read the intervening Supreme Court decision fairly and determine whether it requires a different result." *Ostrofe v. H.S. Crocker., Inc.* (9th Cir. 1984) 740 F.2d 739, 748

Finally, the conclusion of the Fifth and Ninth Circuits was echoed by the Court of Appeal in *In re Patrick W.* (1980) 104 Cal.App.3d 615. In that case, the United States Supreme Court had remanded the lower court's decision, "for further consideration in the light of *Fare v. Michael C.* (1979) 442 U.S. 707." The court noted that the facts of *Fare, supra,* were,

> "distinguishable from those before us on this appeal...Admittedly there is *language* in the Supreme Court opinion that might be interpreted as indicating that that court would take a similar view of a right to see grandparents. However, in its action in the case before us, the United States Supreme Court did not reverse our judgment on the authority of *Michael C.* but merely directed us to reconsider our opinion 'in the light of' that opinion. We have obeyed that direction." *Id.* at 617

In an article published in the Hastings Constitutional Law Quarterly,* Professor Arthur Hellman examined the Supreme Court's practice of remanding for reconsideration of intervening precedent and concluded that,

> "the Court appears to be saying that such orders are issued when the Justices have found enough similarities between the case before

* Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. Law Q. 5 (1984)

> them and the intervening decision to indicate as a prima facie matter, that the judgment below is in error, but because of other aspects of the case, the Court is not prepared to reverse outright." *Hellman, supra,* 10

This conclusion is supported by the Supreme Court's comment in *Goldbaum v. United States* (1954) 348 U.S. 905, 906, another case remanded for reconsideration in light of intervening precedent.

> "We have not considered the merits of these cases, nor have we determined their relation to our recent opinions, *supra*, believing that re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the...decisions."

In his article, Professor Hellman reported the results of a survey he conducted of those cases remanded for reconsideration in light of intervening precedent. In Professor Hellman's opinion, the practice of remanding cases for reconsideration was at least in part a response to calendar pressure felt by the Court.

> "When a newly filed certiorari petition or jurisdictional statement appears to raise an issue similar to one that is being accorded plenary consideration, the Justices face something of a dilemma.
>
> "On the one hand, to grant plenary review would be to allocate a scarce position on the plenary docket to a case that would probably add little or nothing to the precedential guidance available from the case already taken...with the fierce competition for places on the plenary docket today, the procedure [of hearing several cases on the same subject] is now more difficult to justify, and the Court has largely abandoned it.
>
> "On the other hand, to allow the judgment in the later-filed case to stand without regard to the impending plenary decision might be to deprive at least one litigant of the benefit of a new rule of law solely by reason of an accident of timing....
>
> "Given these constraints, it is understandable that the Justices would adopt the practice of holding the new case until the plenary decision is announced and then, unless the judgment below seems clearly in harmony with the new precedent, remanding for further consideration by the lower court."

That is, of course, exactly what happened in this case.

In his study of approximately 100 cases that were similarly held for the decision in the plenary case for the terms 1977-1979, Professor Hellman found that the lower court adhered to its original judgment in sixty cases, despite, "at least a surface inconsistency between the vacated judgment and the cited decision." *Hellman, supra* p. 17

> "Sometimes the [lower] court conceded that the decision cited by the Supreme Court was squarely on point, reversed its ruling on the issue the Justices had addressed, and went on to find that its earlier judgment could be upheld on some other ground. More often, the court determined that the rule set forth in the intervening decision did not apply, or that if it did apply, the facts were sufficiently distinguishable to justify a different result from that of the cited case." *Hellman, supra*, p. 17-18

Most significantly, Professor Hellman concluded that,

> "[W]hile the Court does not automatically direct reconsideration of all cases that have been set aside to await the announcement of a plenary decision, **the criteria for this mode of disposition are not exacting.** Specifically, **a general similarity of issues and a surface inconsistency in results will usually suffice to persuade the Justices to remand a case rather than deny review. The courts that have been directed to reconsider their prior decisions are therefore correct in thinking that a remand order 'should not be read as implying that [the cited authority] necessarily mandates reversal...'"** *Hellman, supra*, at p. 19-20 (emphasis added)

Indeed, this lack of exactitude has lead the Supreme Court to remand for reconsideration in cases which the remand can only be attributable to a lack of careful examination of the lower court's opinion. For instance, in a series of cases remanded for reconsideration in light of *Adams v. Texas* (1980) 448 U.S. 38, the Court remanded one case to the lower court which had already considered and distinguished *Adams*. *May v. State* (1980) 618 S.W.2d 333

Similarly, the Supreme Court remanded two cases to this Court for re-examination in light of *Adams, supra*, *People v. Lamphear* (1980) 26 Cal.3d 814, and *People v. Velasquez* (1980)26 Cal.3d 425. The remand was

curious because *Adams, supra*, involved a Texas court's **affirmance** of a conviction based upon a statute which improperly mandated exclusion of jurors in a capital case in violation of Witherspoon *v. Illinois* (1968) 391 U.S. 510, whereas the California cases **reversed** convictions for improper exclusion of jurors per *Witherspoon*.

Responding to the United States Supreme Court's mandate, this Court noted that it had, "reexamined our opinion in this case...in light of *Adams v. Texas....Adams...*does not alter [our] conclusion." *People v. Velasquez* (1980) 28 Cal.3d 461-462, *People v. Lamphear* (1980) 28 Cal.3d 463-464

In the case at bar, it follows from the above authorities that the Supreme Court's action in remanding the case to this Court for further consideration in light of *Rose v. Clark*, did not render the decision in *Hamilton I* "a nullity." The remand was not the equivalent of a summary reversal, *Ostrofe, supra*, and it was not a "decision on the merits," *Henry, supra*. The case was simply remanded to this court to call attention to an important precedent which this court could not have been aware of when it made its original decision.

C.

EVEN ASSUMING THAT THE UNITED STATES SUPREME COURT'S REMAND WAS TANTAMOUNT TO A SUMMARY REVERSAL, THE REMAND DID NOT RENDER *HAMILTON I* A "NULLITY"

Even assuming, arguendo, that the Supreme Court's decision in *California v. Hamilton, supra*, was somehow the equivalent of a summary reversal, which it was not, that still did not render *Hamilton I* a "nullity." By way of analogy, when the United States Supreme Court reversed this Court's decision in *People v. Brown* (1985) 40 Cal.3d 512 in *California v. Brown*, (1987)__U.S.__, [107 S.Ct. 837] this Court did not thereafter issue

a supplemental opinion which either declared *People v. Brown* a "nullity" or one which reiterated the views of this Court as expressed therein; *Brown* remained a viable precedent on those grounds not covered by the reversal.

In *Hamilton II*, this Court cited *Brown, supra*, as, "*People v. Brown* (1985) 40 Cal.3d 512, 538-544, **reversed on there grounds, sub nomine** *California v. Brown* (1987) __U.S.__ [107 S.Ct. 837]." (emphasis added) If it is a valid assertion that *Hamilton I* is a "nullity" because the judgment was vacated and remanded for further consideration in light of *Rose v. Clark*, would not *Brown, supra*, which was simply reversed, be equally nullified? The answer is obvious. Even if the Supreme Court's action in the instant case was the functional equivalent of a summary reversal, which it was not, it did not affect any issue decided in *Hamilton I* except insofar as the harmless error test of *Rose v. Clark* might have any bearing on this Court's assessment of the prejudicial effect of the *Carlos* error in *Hamilton I*.

II

THIS COURT SHOULD GRANT APPELLANT'S PETITION FOR REHEARING BECAUSE WHEN THIS COURT ISSUED ITS OPINION IN *HAMILTON II*, IT WAS WITHOUT JURISDICTION TO CONSIDER ANY ISSUE OTHER THAN THE IMPACT OF *ROSE V. CLARK*, IF ANY, ON APPELLANT'S CASE

California Rule of Court 24 (a) provides that,

> "A decision of the Supreme Court becomes final 30 days after filing...When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court..."

Consequently, it is clear that this Court's jurisdiction in appellant's case is limited to the impact, if any, of *Rose v. Clark* on appellant's case. Because this issue has been extensively briefed in previous supplemental

briefs submitted to this Court, no purpose would be served by reiterating the points therein raised.

IV

THIS COURT SHOULD GRANT A REHEARING OF APPELLANT'S CASE BECAUSE THE COURT'S OPINION DID NOT TAKE INTO CONSIDERATION THE FULL EXTENT OF THE PROSECUTOR'S MISLEADING REMARKS TO THE JURY EMPHASIZING THE UNCONSTITUTIONAL "MANDATORY" SENTENCING LANGUAGE OF CALJIC 8.84.2

At the conclusion of the penalty phase of appellant's trial, the jurors were instructed in the language of former CALJIC 8.84.2 that,

> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you **shall** impose a sentence of death." (emphasis added)

This court held in *People v. Brown* (1985) 40 Cal.3d 512, 538-544 that CALJIC 8.84.2 was misleading in that it might suggest to a juror that if he or she found that the mitigating factors were outweighed by the factors in aggravation, the juror was compelled to vote for death even though the juror felt that, under the circumstances, death was not the appropriate punishment.

Prosecutor's comments on mandatory sentencing

In cases subsequent to *Brown, supra*, the Court has looked to the closing argument of the prosecutor to determine if the prosecutor exploited this constitutional infirmity to the prejudice of appellant, or, if he corrected any misimpression the jurors might have by informing them that even if they found that the aggravating factors outweighed those in mitigation, they could still vote for life imprisonment if they thought that it was the appropriate punishment.

In the case at bar, the Court's opinion indicates that the prosecutor only "referred briefly to the mandatory sentencing language" and that he "clearly acknowledged" that they had discretion "to make the tremendous decision, tough decision." (Slip op. 30)

The Court's opinion refers only to the tip of the iceberg of the prosecutor's prejudicial remarks to the jury. The references made by the prosecutor to the mandatory sentencing instruction were not, "brief and mild," but were extensive, categorical, and unqualified. Most significantly, the Court's opinion fails to consider the prosecutor's extraction of promises from the jurors during voir dire to abide by the prosecutor's mandatory sentencing formula if a penalty trial occurred.

Voir dire

During voir dire, the prosecutor told eleven out of twelve jurors who rendered verdicts in appellant's case that the law required that if they found that the aggravating factors outweighed those in mitigation they **must** vote for the death penalty. Moreover, each juror was then asked to promise the prosecutor that if the factors in aggravation outweighed those in mitigation, **they would impose the death penalty.** Naturally, when asked, they promised.

The questioning of juror Garfield Winters is illustrative. The prosecutor first explained that evidence in aggravation was evidence against the defendant and that evidence in mitigation was evidence that was favorable to the defendant. He then asked Mr. Winters,

"Q. [Y]ou...understand that in your judgment, yours and the other jurors if the evidence against the defendant outweighs the evidence in favor of him, **there is no way around it**, then you have to bring back a verdict of death.
A. Yes.
Q. Is that your understanding?

A. Yes.
Q. Are you willing to do that if that's how it turns out?
A. Yes." (R.T. 650) (emphasis added)

Similarly, the prosecutor told juror Sylvia Bania that the judge

"Q. ...will also instruct you that in the event the evidence in aggravation outweighs the evidence in mitigation, that you must bring back a verdict of death?
A. Yes.
Q. All right. In other words, the standard is set, then.
A. Yes
Q. In other words, if you find one of those, **you are bound to that verdict?**
A. Right. (R.T. 1200-1201)"[1]

All the jurors so asked gave the prosecutor their solemn assurance that they would follow the mandatory sentencing scheme as outlined by the prosecutor; they told him that it was understood that they had no choice but to impose the death penalty if they found that the aggravating circumstances outweighed those in mitigation.

Most significantly, neither the judge nor the defense attorney at any time suggested that the jurors' obligation was anything different from that which the prosecutor stated.

Closing argument

Given the mandatory sentencing catechism that occurred during voir dire, it was unnecessary for the prosecution to engage in any extended discussion of the meaning of CALJIC 8.84.2 as did the prosecutor in *People v. Milner* (1988) _Cal.3d_ to create extensive prejudice; all the prosecutor had to do was to remind the jurors of the assurances previously given during voir dire to reactivate their promises to adhere to the prosecutor's unconstitutional mandatory sentencing formula.

---

[1] A similar promises were posed to all the other jurors except Henry Berry Jr. who was the first to be voir dired of those eventually selected: David Bergman (R.T. 879:1), Orlow Garrett (R.T. 1435:17), Jose Leal (R.T. 1247:23), Dathelma McNaught-Davis (R.T. 484:11), Ronald Orton (R.T. 1518:18), Kimberly Otto (R.T.740:1), Martha Penny (R.T. 1477:25), Louis Perez (670:8), and Sandra Sheffield (R.T. 750:20).

> "Now remember at the time of the voir dire you all promised that in the event that this case when to a penalty phase and the aggravation evidence outweighed the mitigation evidence, you would impose the death penalty. Well, that is the case here, and now is the time. You should not let sympathy for the defendant or his family affect your deliberations." (R.T. 4642)

Significantly, at no time during his closing argument did the prosecutor ever suggest to the jurors that their job was not to mechanically impose the death penalty, but, rather, after the weighing process was concluded, to determine if death was the appropriate punishment. Far from correcting, or in any way modifying the mandatory language of CALJIC 8.84.2, **every time** the prosecutor touched upon the subject of the jury's sentencing responsibilities, the prosecutor exploited that mandatory language and hammered away at one insistent theme: if aggravation outweighed mitigation, then it was the jury's legal obligation to impose the death penalty.

At the outset, the prosecutor told the jury that their task was to,

> "consider evidence from both the guilt phase and the penalty phase to determine whether or not the aggravation outweighs the mitigation." (R.T. 4621)

Later on, he told the jury that imposition of the death penalty was a foregone conclusion because of the overwhelming nature of the aggravating evidence.

> "How about all the terror she went through during the perpetration of that robbery and kidnapping before she was finally slaughtered. Right there we could stop. There is more than enough aggravation to inflict the death penalty, because right there it outweighs whatever they could put into mitigation." (R.T. 4623-4624)

Again he told the jury that if aggravation outweighed mitigation, their job was to impose the death penalty.

> "So, ladies and gentlemen, you are the ones who have to add up and come to the total, how does the alleged mitigation stack up against the overwhelming aggravation. In Latin there is a phrase nolo

> contendere. Do you know what that means? No contest. And that is exactly what it is." (R.T. 4641)

Finally, as indicated *supra*, the prosecutor recalled the jurors' promise to impose the death penalty if the aggravating factors outweighed the mitigating factors.

> "Well, that is the case here, and now is the time. You should not let sympathy for the defendant or his family affect your deliberations." (R.T. 4642)

The prosecutor reminded the jurors of their commitment to vote for the death penalty, as though they were delegates to a political convention, and he was the candidate's floor manager calling in his markers.

Against this backdrop of individual indoctrination during voir dire and unrepentant closing argument, the "ameliorative" aspects of the prosecutor's presentation to the jury noted in the Court's opinion are paltry indeed.

Discretion

The sole reference to the jurors' "discretion" is contained in the second paragraph of the prosecutor's introductory remarks, wherein he informed the jurors that,

> "The issue of determining the punishment for these horrendous crimes rests in your **discretion**, guided by some factors, but not limited to those factors, that will be given to you by the court."

It would be unreasonable to assume that lay persons on the jury would be able to divine the subtle concepts advanced by this Court in *Brown, supra*, from this throw away line in first few moments of the prosecutor's closing argument.

"Tremendous decision, tough decision"

The reference to the "tremendous decision, tough decision" did not precede the reference to "discretion" as suggested by the Court's opinion,

but followed it and in no way represented an amelioration of the language of CALJIC 8.84.2. Rather, it was simply unremarkable introductory language to an argument asking jurors to make an important decision. It cannot be reasonably transmigrated into language that informed the jurors that CALJIC 8.84.2,

> "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate punishment under all the circumstances." *Brown, supra* 40 Cal.3d at 541

Defense counsel's argument

Before responding to the Court's reference to defense counsel's argument, appellant is obliged to point out that there is a conceptual problem with relying on defense counsel's closing argument to ameliorate the prejudicial impact of the trial court's instructions. On the one hand, a juror might give weight to an argument by the prosecutor that he was asking for the death penalty only if the jury found that, under all the circumstances, it was appropriate, because he is the one who is asking the jury to impose the death penalty; a juror might reason that if the prosecutor is not demanding that the death penalty be mechanically imposed if aggravation outweighs mitigation as the court's instructions seem to suggest, since it is he who is asking for the death penalty, his interpretation of the court's instructions should be followed.

However, defense counsel's argument comes before the jury in an entirely different posture. He's trying to save his client's life. If he says that the law requires more than the judge instructs, it is not a concession "against interest" as it would be if the same language came from the prosecutor. Moreover, CALJIC 1.00 and 1.02 make it quite clear that it is the judge, not counsel, who states the applicable law.

The Court's opinion suggests that defense counsel's argument that, "it was the responsibility of the jurors, and the jurors alone, to determine whether the death penalty was appropriate for defendant" (Slip op. 30) had some impact on assessing the prejudicial impact of CALJIC 8.84.2. It is hard to see how.

Though the Court's opinion cites no page reference, there is only one passage which has language arguably reflecting the Court's synopsis of defense counsel's argument.

> "[I]t is for you the jury to determine the appropriate punishment . If you find that one single factor in mitigation is sufficient to return a verdict of life without possibility of parole, that is your choice." (R.T. 4650)

This can hardly be said to inform the jury that even if the aggravation outweighs the mitigation, a juror is not required to vote for the death penalty, "unless, upon completion of the 'weighing' process, he decides that death is the appropriate punishment under all the circumstances." *Brown, supra* 40 Cal.3d at 541 This is particularly true in light of the fact that defense counsel was at most arguing to the jury to conduct its penalty determination in a particular way in contrast to the prosecutor who had previously obtained promises from the jury to do just the opposite.

Instructions

Similarly, neither of the instructions quoted by the Court in its opinion convey the essence of the *Brown* analysis quoted above. As this Court pointed out in *People v. Allen* (1986) 42 Cal.3d 1222, and reiterated more recently in *People v. Myers* (1987) 43 Cal.3d 250, the holding of *Brown, supra* was expressed in a two stage analysis.

> "First, we pointed our that the jury might be confused about the nature of the weighing process. As we observed: '[T]he word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the factors he is permitted to consider.'
>
> Second, we were concerned in *Brown* that the unadorned instruction's phrase, 'the trier of fact...*shall* impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances' (emphasis added), could mislead the jury as to the ultimate question it was called on to answer in determining which sentence to impose. Although the quoted phrase could be understood to require a juror (i) to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal views as to the appropriate sentence, and then (ii) to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe that death is the appropriate sentence under all the circumstances, we concluded in *Brown* that the statute was not intended to, and should not, be interpreted in that fashion. Instead we stated: 'By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the weighing process, *he decides that death is the appropriate penalty under all the circumstances.*"

In the case at bar, both instructions only deal with the first prong of the *Brown* analysis, namely the weight to be given to the individual factors. The first quoted instruction merely told the jurors that it is not the numbers of aggravating or mitigating factors that count, but that they were

to consider, "the factors on each side as a whole." They were also told that they must be convinced beyond a reasonable doubt that the, "totality of aggravating circumstances outweigh[s] the totality of the mitigating circumstances."

However, the jurors were never instructed in accordance with the second prong of *Brown, supra*, namely that after the weighing process was complete, they must, "decide[] that death is the appropriate penalty under all the circumstances." In many respects, the situation in appellant's case is similar to that of the defendant in *Meyers, supra*. In that case, the Court found that it was unlikely that the jury was confused as to the nature of the weighing process, but found that they were misled as to their ultimate responsibility once the weighing process was complete. Compare, for example, the following passages from the prosecutor's closing argument in Meyers, *supra*, with the closing argument in the case at bar.

People v. Myers
"Once you determine, once you make a determination as to whether or not the aggravating circumstances...outweigh those in mitigation or the mitigating circumstances...outweigh those in aggravation, then the law says what verdict you shall return"

People v. Hamilton
"Now remember at the time of the voir dire you all promised that in the event that this case when to a penalty phase and the aggravation evidence outweighed the mitigation evidence, you would impose the death penalty. Well, that is the case here, and now is the time."

Conclusion

The prosecutor sought to extract full advantage from the mandatory sentencing instruction starting with voir dire and continuing through closing argument. During voir dire he told the jurors that they had no choice once they found that aggravating circumstances outweighed those in mitigation - they were legally required to impose a sentence of death. Moreover, without objection or correction by either defense counsel or the trial court, he asked the jurors to promise him that they would impose the death penalty if that turned out to be the case.

In argument, the prosecutor conceded nothing, told the jurors that aggravating factors clearly outweighed those in mitigation, and reminded them that they promised him in voir dire that if that they would live up to their legal obligation and impose the death penalty.

Defense counsel said nothing to contradict the mandatory gloss of the prosecutor's argument and the trial court's instructions did not suggest that there was any alternative open to the jurors other than a verdict of death once they found that the factors in aggravation outweighed those in mitigation.

Appellant was prejudiced by the reading of CALJIC 8.84.2 and that prejudice was compounded, not ameliorated, by the prosecutor's remarks.

VII

THE COURT SHOULD GRANT APPELLANT'S PETITION FOR A REHEARING ON THE GROUNDS THAT ITS HOLDING THAT THE GUILT AND PENALTY TRIALS ARE PART OF A UNITARY AND INDIVISIBLE

PROCESS FOR THE PURPOSES OF DETERMINING THE TIMELINESS OF APPELLANT'S PENALTY PHASE *PRO PER* MOTION CONFLICTS WITH THE HOLDING OF *BULLINGTON V. MISSOURI* (1981) 451 U.S. 430

A

APPELLANT HAD AN ABSOLUTE RIGHT TO REPRESENT HIMSELF AT THE PENALTY PHASE BECAUSE, FOR THE PURPOSES OF THE TIMELINESS OF APPELLANT'S REQUEST TO BE HIS OWN LAWYER, THE PENALTY PHASE IS A SEPARATE TRIAL

In its opinion in appellant's case, this Court held that appellant's motion to represent himself at the penalty phase of his trial was properly denied by the trial court because appellant's motion was made, "in the midst of the jury's guilt phase deliberations" and therefore, "it was not timely for the purposes of invoking an absolute right of self representation." (Slip. op. 26)

In support of its conclusion that the penalty phase was but, "a stage in a unitary capital trial," (Slip. op. 26-27) the Court cites Penal Code §§ 190.4(c) and 190.4 (d) which require the jury that determined appellant's guilt to determine penalty, and to use the evidence presented at the trial of appellant's guilt in determining the appropriate penalty. While these statutes do envision a unitary capital procedure, in *Bullington v. Missouri* (1981) 451 U.S. 430, the United States Supreme Court has made it clear that such labels are not determinative where constitutional issues are at stake.

In *Bullington, supra*, the defendant had been tried and convicted of "capital murder" under a Missouri statute very similar to California's statutory scheme. The Missouri law provided that, after the guilty verdict,

> "the court shall resume the trial and conduct a presentence hearing before the jury...at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury...shall hear additional evidence in extenuation, mitigation, and aggravation..." Mo. Rev. Stat. § 565.006.

In *Bullington*, the jury set the punishment at life. The defendant then moved for and was granted a new trial based upon jury selection issues. The prosecutor indicated that he would be seeking the death penalty again and the defendant sought pretrial review which led to the granting of certiorari by the United States Supreme Court.

In its opinion, the Court held that the Double Jeopardy clause applied to the first jury's determination that the punishment should be life because, unlike other sentencing procedures,

> "[t]he presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. **It was itself a trial on the issue of punishment** so precisely defined by the Missouri statutes." *Id.* at 437 (emphasis added)

A similar result was reached a few years later in *Arizona v. Rumsey* (1984) 467 U.S. 203, applying the principles of *Bullington*, *supra*, to the Arizona capital statute. See also *Young v. Kemp* (11th Cir. 1985) 760 F.2d 1097, 1106 (applying *Burlington* to the Georgia capital statute); *Jones v. Thigpen* (5th Cir. 1984) 741 F.2d 805, 814, *remanded on other grounds*, 106 S.Ct. 689 (1986) ("After *Bullington*, a capital sentencing proceding like Mississippi's is regarded as a second 'trial' at which the prosecution must again 'prove its case' if it is to obtain a death sentence.")

The obvious import of the *Bullington* rationale to a *Faretta* [2]issue at the penalty stage has already been commented on by two members of the United States Supreme Court. Speaking for Justice Brennan and himself, Justice Marshall noted the applicability of the *Bullington* rationale to a Maryland defendant who represented himself at the guilt trial and then sought to have counsel appointed to represent him at the penalty trial.

[2] *Faretta v. California* (1974) 422 U.S. 806

Grandison v. Maryland (1986) 93 L.Ed.2d 174 *cert. den.*, Marshall, J. dissenting.

> "In *Bullington v. Missouri*,...this Court held that the Double Jeopardy clause applied to the sentencing phase of a bifurcated trial. It did so because it found that a sentencing hearing was like a separate trial....It may require selection of a new jury[3]...Evidence is offered...; the parties may present argument...; the jury is instructed,...; and the jury deliberates and determines sentence. The Maryland proceeding is in all respects a separate trial on the issue of punishment. **The waiver of the right to counsel at the first 'trial on guilt or innocence should therefore have no more bearing on a defendant's right to counsel in the sentencing phase that it would on that defendant's right to counsel in a separate trial on related crimes.** It should under no circumstances irrevocably bind a defendant in the sentencing phase." *Id.* at 175-176 (emphasis added)

B

EVEN ASSUMING THAT APPELLANT'S RIGHT TO SELF REPRESENTATION WAS LESS THAN ABSOLUTE WHEN ASSERTED BEFORE THE COMMENCEMENT OF THE PENALTY PHASE, THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW APPELLANT TO BE HIS OWN LAWYER

At the outset, it should be noted that when the United States Supreme Court described the right of a criminal defendant to represent himself, it did so in unequivocal terms.

> "[T]he right of self-representation - to make one's own defense personally - is...necessarily implied by the structure of the [Sixth] Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta, supra*, 422 U.S. at 804-805

Though the question of timeliness was not before the Court in that case (Faretta made his motion to represent himself weeks before the trial started), the **only** qualification imposed by the United States Supreme Court on the federal constitutional right of self representation is that a

[3] In the event of the discharge of the guilt phase jury for cause, and where guilt was established by plea or by bench trial.

defendant acting as his own counsel must abide by the rules of the trial court.[4]

The trial court appears to have relied on certain factors enumerated in *People v. Windham* (1977) 19 Cal.3d 121 that conflict with federal constitutional standards and other factors which are unauthorized under any accepted state or federal standard of review.

In *Windham, supra*, the Court set out the factors to be considered in evaluating a defendant's mid trial request to act as his own lawyer.

> "[1] [T]he quality of counsel's representation of the defendant, [2] the defendant's prior proclivity to substitute counsel, [3] the reasons for the request, [4] the length and stage of the proceedings, and [5] the disruption or delay which might reasonably be expected to follow the granting of such a motion." *Id.* 19 Cal.3d at 128

There are seven paragraphs of reasons cited by the trial court justifying its decision to deny appellant the right to be his own lawyer. Four of the seven concern the shackling of appellant which this Court characterized as "irrelevant." (Slip op. 26) One paragraph concerns the trial court's admiration for the good job done by appellant's counsel and one paragraph concerns the trial court's view of appellant's trial tactics. [5]

1. The quality of counsel's representation of defendant. This is an improper consideration under the constitutional standards laid down by *Faretta, supra*. The Supreme Court assumed that it was, "undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance that by their own unskilled efforts" (*Id.* at 805) but, in spite of that consideration, held that a defendant still had the right to represent himself.

Consequently, the trial court's observation that appellant's counsel had, "done an outstanding job in their representation of the defendant..." is manifestly irrelevant in an evaluation of a request for self representation.

2. The defendant's prior proclivity to substitute counsel. While this factor might be of consequence in resolving a *Marsden*[6] motion, it is only tangentially relevant in the instant situation. A defendant's right to be his own lawyer is not derivative from his right to waive representation by counsel or substitute one counsel for another. As the Court noted in *Faretta, supra*,

> "Our concern is with an *independent* right of self representation. We do not suggest that this right arises mechanically from a defendant s power to waive the right to the assistance of counsel." *Id.* 422 U.S. at 804-805 f. 15

3. The reasons for the request. Again, this factor is of little or no constitutional significance in appellant's case. (*Windham, supra*, 19 Cal. 3d. at 128, f. 5) A defendant may have a multitude of reasons why he wants to be his own lawyer; some cognizable in legal parlance, others in inchoate form. However, so long as a defendant, "is made aware of the dangers and disadvantages of self representation" *Faretta, supra*, 422 U.S. at 835, and the trial court is satisfied that the assertion of the right is done in a "knowing and intelligent[]" manner, a defendant has a constitutional right to be his own lawyer, regardless of the reasons for his decision. Clearly, appellant was making a knowing choice.

---

[4] "The right of self representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Id.* at 835, f.46

[5] The trial court's reference to appellant's "trial tactics" as "preposterous" and the comment that if appellant "had followed those tactics..the result would have been absolutely disastrous" (Slip op. p. 24) is curious. Defendant was convicted of every thing he was charged with and sentenced to death. How much worse could appellant have done if he had represented himself?

[6] *People v. Marsden* (1970) 2 Cal.3d 118

4. The length and stage of the proceedings. Appellant's motion was made in between the guilt phase and the penalty phase and hence, this factor is of little relevance

5. The disruption or delay which might reasonably be expected to follow the granting of such a motion. In the case at bar, appellant specifically told the trial court that he was not asking for a delay in the procedings in order tc proceed in *pro per*. As this Court was careful to note in *Windham, supra*,

> "Our imposition of a 'reasonable time' requirement should not be, must not be used as a means of limiting a defendant's *constitutional* right of self representation. **We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice.**" *Id.* 19 Cal.3d at 128, f. 5 (emphasis added)

Given the absence of **any** "delay [of] a scheduled trial," the trial court's abuse of discretion was manifest.

That leaves the one paragraph where the trial court finds it inconceivable that appellant could represent himself in the penalty phase. Inability on the part of the trial court to conceptualize appellant pleading for his life to a jury is not a constitutionally permissible reason to deny appellant his right to be his own lawyer.

C.

CONCLUSION

The right of a defendant to represent himself is of particular importance when it is asserted prior to the commencement of the penalty phase. If the right of self representation means anything, it means that a defendant can plead for his life through his own words directly to the jurors who have his fate in their hands.

The United States Supreme Court has definitively ruled that state characterizations of trial procedings as "unitary" are not controlling when constitutional rights are infringed. In two decisions construing statutes similar to California's, the court has held the penalty phase to be a separate trial. Given the fact that appellant asserted his right before the penalty trial began, this Court should grant appellant's petition for a rehearing.

Order Denying Rehearing and Final Judgment

Order Due

ORDER DENYING REHEARING

No. S001870 - S004363

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Respondent

v.

BERNARD LEE HAMILTON, Appellant

IN RE BERNARD LEE HAMILTON ON HABEAS CORPUS

petitions for rehearing DENIED.

The motion to file additional briefing is denied.

Opinion modified.

Broussard, J. is of the opinion the; petition should be granted.

Chief Justice

61

IN THE

Supreme Court of the State of California

REMITTITUR

No. S004363 (CR21958)

THE PEOPLE,
Plaintiff & Respondent,

vs.

BERNARD LEE HAMILTON,
Defendant & Appellant.

SUPERIOR COURT NO. 47283

The above-entitled cause having been heretofore fully argued, and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the* judgment of the Superior Court of the County of San Diego in the above-entitled cause, is hereby affirmed.

I, LAURENCE P. GILL, *Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the* 19th *day of* May, *19* 88.

WITNESS *my hand and the seal of the Court,*
this 28th *day of* July, *19* 88.

SEAL

LAURENCE P. GILL
Clerk

By KENNETH A. WAGOVICH
Deputy

62

Order of Hon. Sandra Day O'Connor Extending Time in Which File Petition for Writ of Certiorari

Supreme Court of the United States

No.
A-220

Bernard Lee Hamilton,
Petitioner

v.

California

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 26, 1988.

s/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 19th day of September, 1988.

63

California Pen. Code 187 *et seq.*

California Rules of Court 24(a)

proceeds of, or is
tly from the pro-
, is guilty of the
In consideration
t to counsel af-
nendment to the
and Section 15 of
nia Constitution,
attorney who ac-
ng a client in a
proceeding, the
lly be required to
instrument was
with the intent to
ing the source of
of the criminal

ddivision shall be
in the county jail
ar or in the state
more than two
lars ($250,000) or
operty transacted,
both that impris-
, for a second or
a violation of this
ne that may be
thousand dollars
the value of the
ever is greater.
y other provision
this section each
ducted shall con-
le offense.
ain in effect only
as of that date is
enacted statute,
January 1, 1992,
ate. Added Stats

Intent to Murder.

10. Libel. §§ 248–257. [Repealed]
11. Slander. §§ 258–260.

Cal Jur 3d (Rev) Criminal Law §§ 180 et seq., Witkin Crimes pp 270 et seq.

CHAPTER 1
Homicide

§ 187. [Murder defined] (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law. [1872; 1970 ch 1311 § 1.] *Cal Jur 3d (Rev) Criminal Law §§ 124, 180 et seq. 197, 245, 354, 355, 360, 382, 2014, 2740, 2747, 2823, 2838, 3183, 3224; Witkin Crimes pp 271 et seq., 289; Criminal Procedure pp 179, 189.*

64

§ 188. [Malice defined] Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice. [1872; 1981 ch 404 § 6; 1982 ch 893 § 4.] *Cal Jur 3d (Rev) Criminal Law §§ 90, 201 et seq., 247, 382, 2014, 2301; Witkin Crimes pp 274 et seq., 289 et seq.; Procedure (3d) Plead § 416.*

§ 189. [Degrees of murder] All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

As used in this section, "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code.

To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act. [1872; 1873–74 ch 614 § 16; 1949 ch 16 § 1; 1969 ch 923 § 1; 1970 ch 771 § 3; 1981 ch 404 § 7; 1982 ch 949 § 1, effective September 13, 1982, ch 950 § 1, effective September 13, 1982.] *Cal Jur 3d Appellate Review §§ 546, 547, Statutes §§ 130, 165, 166; Cal Jur 3d (Rev) Criminal Law §§ 76, 207, 208, 211, 213, 215, 219, 224, 229, 230 et seq., 347, 350, 352, 353, 354, 369, 409, 2151, 2301, 2744; Witkin Crimes pp 273, 278, 281, 283, 284, 289, 296, 302, 427.*

§ 190. [Operative term contingent] [Punishment for murder] (a) Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Except as provided in subdivision (b), every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.

(b) Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 25 years to life if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a) or (b) of Section 830.2, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew or reasonably should have known that the victim was such a peace officer engaged in the performance of his or her duties.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall not apply to reduce any minimum term of 25 years in state prison when the person is guilty of murder in the second degree and the victim was a peace officer, as defined in this subdivision, and such person shall not be released prior to serving 25 years confinement. Amended Stats 1987 ch 1006 § 1. *Cal Jur 3d (Rev) Criminal Law §§ 200, 3342 et seq.; Witkin Crimes pp 271, 972, 975–977, 986; Criminal Procedure pp 335, 400.*

§ 190.05. [Penalty for second degree murder when defendant served prior prison term for murder; Procedure] (a) The penalty for a defendant found guilty of murder in the second degree, who has served a prior prison term for murder in the first or second degree, shall be confinement in the state prison for a term of life without the possibility of parole or confinement in the state prison for a term of 15 years to life. For purposes of this section, a prior prison term for murder of the first or second degree is that time period in which a defendant has spent actually incarcerated for his or her offense prior to release on parole.

65

50

son guilty
all suffer
n for life
nfinement
5 years to
shall be
ons 190.1.

vision (b),
the second
the state
e.
commenc-
7 of Title
ll apply to
or 15 years
ant to this
t otherwise
time.
rder in the
ment in the
rs to life if
defined in
subdivision
ction 830.5,
the perfor-
the defen-
have known
eace officer
his or her

(commenc-
er 7 of Title
le shall not
term of 25
e person is
degree and
as defined in
on shall not
ears confine-
.006 § 1. *Cal*
200, *3342 et*
72, 975–977,
, 400.

cond degree
prior prison
The penalty
of murder in
erved a prior
irst or second
in the state
t the possibil-
in the state
s to life. For
or prison term
ond degree is
defendant has
or his or her
de.

(b) A prior prison term for murder for purposes of this section includes either of the following:

(1) A prison term served in any state prison or federal penal institution, including confinement in a hospital or other institution or facility credited as service of prison time in the jurisdiction of confinement, as punishment for the commission of an offense which includes all of the elements of murder in the first or second degree as defined under California law.

(2) Incarceration at a facility operated by the Youth Authority for murder of the first or second degree when the person was subject to the custody, control, and discipline of the Director of Corrections.

(c) The fact of a prior prison term for murder in the first or second degree shall be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(d) In case of a reasonable doubt as to whether the defendant served a prior prison term for murder in the first or second degree, the defendant is entitled to a finding that the allegation is not true.

(e) If the trier of fact finds that the defendant has served a prior prison term for murder in the first or second degree, there shall be a separate penalty hearing before the same trier of fact, except as provided in subdivision (f).

(f) If the defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty or nolo contendere, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If the new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in the state prison for a term of 15 years to life.

(g) Evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(h) In the proceeding on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition, and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or the prior prison term for murder of the first or second degree which subjects a defendant to the punishment of life without the possibility of parole, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(1) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of the prior prison term for murder.

(2) The presence or absence of criminal

66

activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(3) The presence or absence of any prior felony conviction.

(4) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(5) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(6) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his or her conduct.

(7) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(8) Whether or not at the time of the offense the ability of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

(9) The age of the defendant at the time of the crime.

(10) Whether or not the defendant was an accomplice to the offense and his or her participation in the commission of the offense was relatively minor.

(11) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of life without the possibility of parole if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement in the state prison for 15 years to life.

(i) Nothing in this section shall be construed to prohibit the charging of finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Added Stats 1985 ch 1510 § 1.

§ 190.1. [Procedure in case involving death penalty.] A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4. [Initiative adopted November 7, 1978.] *Cal Jur 3d (Rev) Criminal Law §§ 9, 3342 et seq.; Witkin Crimes pp 122, 271, 972, 973, 976, 977, 978, 979, 980, 982, 986; Criminal Procedure pp 521, 550.*

§ 190.2. [Mandatory penalty upon special findings.] (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California

67

pursuant to this
separate phases as

: defendant's guilt
If the trier of fact
y of first degree
ne time determine
ial circumstances
Section 190.2 ex-
ance charged pur-
subdivision (a) of
alleged that the
victed in a prior
of murder in the

ound guilty of first
of the special cir-
ursuant to para-
a) of Section 190.2
efendant had been
ceeding of the of-
or second degree.
urther proceedings
ith of such special

ound guilty of first
or more special
rated in Section
and found to be
ss of not guilty by
Section 1026 shall
1 in Section 190.4.
there shall there-
gs on the question
ed. Such proceed-
s accordance with
190.3 and 190.4.
ber 7, 1978.] *Cal*
Law §§ 9, 3342 et
22, 271, 972, 973,
982, 986; Criminal

penalty upon ap-
nalty for a defen-
urder in the first
onfinement in state
ithout the possibil-
in which one or
cial circumstances
ecially found under

ntentional and car-

s previously con-
first degree or sec-
pose of this para-
ed in another juris-
ted in California

would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

68

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. [Initiative adopted November 7, 1978.] *Cal Jur 3d (Rev) Criminal Law §§ 2788, 2791, 3136, 3342 et seq.; Witkin Crimes pp. 972 et seq.; Criminal Procedure pp. 521 et seq.*

§ 190.25. [Penalty for murder of transportation worker] (a) The penalty for a defendant found guilty of murder in the first degree shall be confinement in state prison for a term of life without the possibility of parole in any case in which any of the following special circumstances has been charged and specially found under Section 190.4, to be true: the victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or the victim was a station agent or ticket agent for the entity providing such transportation, who, while engaged in the course of the performance of his or her duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or was a station agent or ticket agent for the entity providing such transportation, engaged in the performance of his or her duties.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

(c) Nothing in this section shall be construed to prohibit the charging or finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5. [1982 ch 172 § 1, effective April 27, 1982.] *Cal Jur 3d (Rev) Criminal Law §§ 3342 et seq.; Witkin Crimes pp 972 et seq.; Criminal Procedure p 521.*

§ 190.3. [Determination as to imposition of death penalty or life imprisonment upon finding of special circumstance: Admission of evidence.] If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

69

perated on land, in-
ted on stationary rails
suspended in the air,
tation of persons for
agent or ticket agent
g such transportation,
mance of his or her

ether or not the ac-
of intentionally aid-
ng, commanding, in-
uesting, or assisting
ission of murder in
uffer confinement in
of life without the
any case in which
pecial circumstances
on (a) of this section
pecially found under

ection shall be con-
targing or finding of
e pursuant to Sec-
, 190.4, and 190.5
ive April 27, 1982.]
nal Law §§ 3342 et
72 et seq.; Criminal

on as to imposition
imprisonment upon
nstance: Admission
efendant has been
in the first degree,
e has been charged
r if the defendant
death penalty after
of violating subdi-
72 of the Military
ctions 37, 128, 219
trier of fact shall
alty shall be death
rison for a term of
of parole. In the
on of penalty, evi-
y both the people
ny matter relevant
, and sentence in-
o, the nature and
sent offense, any
or convictions
viction or convic-
violence, the pres-
riminal activity by
olved the use or
violence or which
plied threat to use
defendant's char-
mental condition

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. [Initiative adopted November 7, 1978.] *Cal Jur 3d Penal and Correctional Institutions § 134; Cal Jur 3d (Rev) Criminal Law §§ 9, 377, 1724, 1784, 1868, 1870, 1905, 2014, 3342 et seq.; Witkin Criminal Procedure p 521.*

§ 190.4. [Special finding on truth of each alleged special circumstance.] (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance

charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered on any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's

clerk may prescribe, but it shall notify each party that he must file with the clerk of the superior court a further notice specifying such of the designated original exhibits and affidavits as he deems necessary to have transmitted to the reviewing court. [Renumbered effective July 1, 1968; previously amended effective January 1, 1951.] *Cal Jur 3d Appellate Review §§ 393, 409, 412, 593, 594; Courts §§ 30, 31; Cal Practice §§ 61:283, 61:331, 61:336.*

Rule 21.5. "Circuit-riding" sessions

Each Court of Appeal shall adopt a written policy and procedure, not inconsistent with this rule, to facilitate sessions being held, for the convenience of the parties and counsel, at places within the district other than the court's permanent locations. Sessions may be held at any place where it appears that suitable facilities are available and a sufficient number of cases may be set for at least one day of hearings. [Adopted effective July 1, 1981.]

Rule 22. Oral argument

Unless otherwise ordered: (1) counsel for each party shall be allowed 30 minutes for oral argument, except that in a case in which a sentence of death has been imposed each party shall be allowed 45 minutes; (2) not more than one counsel on a side may be heard except that different counsel for the appellant or the moving party may make opening and closing arguments and in a case in which a sentence of death has been imposed two counsel may be heard in either opening or closing argument for each side; (3) each party and intervener who appeared separately in the court below may be heard by his or her own counsel; and (4) the appellant on a direct appeal or the moving party shall have the right to open and close. On Supreme Court review of a Court of Appeal decision, the petitioner for review is the moving party.

If two or more parties file notices of appeal or petitions for review, the court will indicate the order of argument. [As amended effective May 6, 1985; previously amended effective July 1, 1981.] *Cal Jur 3d Appellate Review § 146; Cal Practice §§ 61:348, 61:350.*

Rule 22.5. Time of submission of cause in Court of Appeal

(a) A cause pending in a Court of Appeal is submitted when the court has heard oral argument, or has approved a waiver of oral argument, and the time has passed for filing all briefs and papers, including any supplementary brief permitted by the court.

(b) Submission may be vacated only by an order stating the reasons therefor. The order shall provide for resubmission of the cause. [Adopted effective Sept. 1, 1978; applicable to all cases in which oral argument is held, or a waiver of oral argument is approved, after August 31, 1978.]

Rule 23. Findings and additional evidence on appeal

(a) [Request for findings] A request that the reviewing court make findings of fact shall contain a draft of the proposed findings, and may be made in a brief, or a separate application may be served and filed. If opposing counsel has not had an opportunity in his brief to object to the request, he may serve and file written opposition thereto.

(b) [Application to produce evidence] Proceedings for the production of additional evidence on appeal shall be in accordance with rule 41. The court may grant or deny the application in whole or in part, and subject to such conditions as it may deem proper. If the application is granted, the court, by appropriate order, shall direct that the evidence be taken before the court or a department or a justice thereof, or before a referee appointed for the purpose. The court shall also prescribe reasonable notice of the time and place for the taking of the evidence and shall indicate the issues on which the evidence is to be taken. Where documentary evidence is offered, either party may submit the original or a certified or photostatic copy thereof and the court may admit the document in evidence and add it to the record on appeal. [As amended effective January 1, 1967.] *Cal Jur 3d Appellate Review §§ 563, 565, 572, 574–576; Cal Practice Rev Ch 50 Findings of Fact and Conclusions of Law; Cal Practice §§ 61:317 et seq.*

Rule 23.5. Form of opinion

The opinion of a Court of Appeal shall identify the judges participating in the decision, including the author of the majority opinion and of any concurring or dissenting opinion, or the three judges participating when the opinion is designated "by the court." [Adopted effective January 1, 1982.]

Rule 24. Decision of reviewing court

(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30-day period or any extension, orders one or more additional periods not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause, or the denial of an application for bail or to reduce bail pending appeal, or the denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court. When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court, except that when the date of finality falls on a holiday or other day the clerk's office is closed, the decision may be modified or rehearing granted until the close of business on the next day the clerk's office is open. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, the modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification. [As amended effective July 1, 1966; previously amended effective January 1, 1957, January 1, 1959, January 1, 1961, January 2, 1962, July 1, 1963, November 11, 1964, January 1, 1968, July 1, 1972, July 1, 1973, and July 1, 1984.]

(b) [Whether judgment is modified] An order modifying an opinion shall specify whether it effects a change in the judgment. [Adopted effective July 1, 1986.]

(c) [Filing consent to modification] If the reviewing court orders that a judgment be reversed and a new trial granted or that, in the alternative, the judgment be affirmed on condition that the party in whose favor judgment has been rendered consent to a remittitur of a portion thereof, or on condition that the party against whom the judgment has been rendered consent to an addition thereto, then, unless otherwise ordered, the judgment of reversal and granting of a new trial shall become final unless within 30 days after the filing of the decision 2 copies of a written consent by such party to the remittitur or addition shall be filed in the reviewing court. One of the copies shall be transmitted with the remittitur to the superior court. [As relettered effective July 1, 1986.]

(d) [Discretionary early finality] Notwithstanding sub-